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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 458

ORVAL E. FAUBUS, *Governor of the State of Arkansas* — *Appellant*

v.

JOHN AARON, *et al. and* THE UNITED STATES OF AMERICA, *Amicus Curiae* — *Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

JURISDICTIONAL STATEMENT

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INDEX

	Page
Jurisdictional Statement	1
Opinion Below	2
Jurisdiction	2
Questions Presented	4
Statement of Case	5
Grounds Upon Which it is Contended that the Federal Questions Are Substantial and that the District Court Abused its Discretion in Granting the Injunction	6
Conclusion	22
Certificate of Service	23

APPENDICES

A—Opinion Below	1a
B—Ark. Const. Article 14, Section 4	19a
C—Act 4, Ark. Acts of 1958 (Second Extraordinary Session)	19a
D—Proclamation of Governor of Arkansas, September 12, 1958	25a
E—Act 5, Ark. Acts of 1958 (Second Extraordinary Session) as amended by Act 151, Ark. Acts of 1959	27a
F—Opinion of Supreme Court of Arkansas in Garrett v. Faubus, 323 SW 2d 877	35a
G—Opinion of Supreme Court of Arkansas in Fitizhugh v. Ford, 323 SW 2d 559	81a

INDEX—(Continued)

CITATIONS

Cases

	Page
Aaron v. Cooper, 358 U.S. 4	5
Asbury Hospital v. Cass County, North Dakota, 326 U.S. 207, S.Ct. 61, 90 L. Ed. 6	9
Briggs v. Elliott, 132 F.Supp. 776	15,18
Brown v. Board of Education, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083	15,17
City of New York v. Miln, 36 U.S. 102, 9 L.Ed. 648, 11 Pet. 102	9
Daniel v. Family Ser. Life Ins. Co., 336 U.S. 220	17
Davies Warehouse Co. v. Bowles, 321 U.S. 144, 64 S.Ct. 474, 88 L.Ed. 635	7
Doyle v. Continental Insurance Co., 94 U.S. 535, 541, 24 L.Ed. 148	10
Everson v. Board of Education, 330 U.S. 1, 67 S.Ct. 504, 512, 91 L.Ed. 711	8
Fitzhugh v. Ford, 323 SW 2d 559	4,6,18,19,20
Garrett v. Faubus, 323 SW 2d 877	3,6,12,14,16
Harlow v. Ryland, 78 F.Supp. 488, aff'd 172 F. 2d 784	8
Herkness v. Irion, La., 278 U.S. 92, 49 S.Ct. 40, 73 L.Ed. 198	2
Kovacs v. Cooper, 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513	8
Lacoste v. Department of Conservation, State of Louisiana, 263 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437	9
Lambert v. California, 355 U.S. 225, 78 S.Ct. 240, 2 L.Ed. 2d 228	9
Liggett Company v. Baldridge, 278 U.S. 105, 49 S.Ct. 57, 73 L.Ed. 204	9

Page

Local 333B United Marine Div. of International Longshoremen's Assn. v. Battle, 101 F.Supp. 650, aff'd 342 U.S.880, 72 S.Ct. 178, 96 L.Ed. 661 8

Munn v. Illinois, 94 U.S. 113, 24 L.Ed. 77 9

National Maritime Union v. Herzog, 78 F. Supp. 146 (D. C. Dist. of Columbia), aff'd 334 U.S. 854, 68 S.Ct. 1529, 92 L.Ed. 1776 7

Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659, 24 L.Ed. 1036 10

Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U.S. 386, 54 S.Ct. 732, 78 L.Ed. 1318 2

Palmetto Fire Ins. Co. v. Conn., 272 U.S. 295, 47 S.Ct. 88, 71 L.Ed. 243 2

Patterson v. Kentucky, 97 U.S. 501, 24 L.Ed. 1115. 9

Prigg v. Pennsylvania, 41 U.S. 539 (16 Pet. 539, 625), 10 L.Ed. 1060 7

Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420, 11 Pet. 420, 9 L.Ed. 773 9

Radio Corp. of America v. U.S. D. C. Ill. 1950, 95 F.Supp. 660, aff'd 341 U.S. 412, 71 S.Ct. 806; 95 L.Ed. 1062 2

Shuttlesworth v. Birmingham Board of Education, 162 F.Supp. 372, 381 aff'd 358 U.S 101 10

Slaughter - House Cases, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394 9

Terrace v. Thompson, 263 U.S. 197, 217, 44 S.Ct. 15, 68 L.Ed. 274 9

Thompson v. County Board of Arlington County, 144 F.Supp. 239 (U. S. D. C. E. D. Virginia) 15,18

Wilentz v. Sovereign Camp, W.O.W., 306 U.S. 573, 59 S.Ct. 709, 83 L.Ed. 994 2

Constitutional Provisions

	Pa.
U.S. Const. Amend. X	21
U.S. Const. Amend. XIV, Sec. 1	21
Ark. Const. Art. XIV, Sec. 4	3,12

Statutes

28 U.S.C. Sec. 1253, Act of June 25, 1945, C. 646, 62 Stat. 926	2
28 U.S.C. Sec. 2281, 62 Stat., p. 968	1
Act 4, Ark. Acts of 1958 (Second Extraordinary Session)	1,2,3,4,5,8,11,17,19,20,21
Act 5, Ark Acts of 1958 (Secong Extraordinary Session) as amended by Act 151 Ark. Acts of 1959	1,3,4,5,18,19,20,21
Act 151, Ark. Acts of 1959	3,4,5

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

JURISDICTIONAL STATEMENT

INTRODUCTORY STATEMENT

The appellant, Orval E. Faubus, Governor of the State of Arkansas, appeals from a final judgment of the United States District Court for the Eastern District of Arkansas, Western Division, entered June 18, 1959, where a three-judge court, convened pursuant to 28 U.S.C. 2281, held Act No. 4 and Act No. 5 (as amended) of the Second Extraordinary Session of the 61st General Assembly of the State of Arkansas for 1958, unconstitutional and invalid as contravening the Fourteenth Amendment to the Constitution of the United States, permanently enjoined this appellant, and others, from further enforcing either of said acts, and declared void the proclamation of the Governor of the State of Arkansas, issued pursuant to

Act No. 4, closing certain high schools in the Little Rock, Arkansas, School District.

In compliance with rules 13 and 15 of the Revised Rules of the United States Supreme Court, this jurisdictional statement is submitted to show that this court has jurisdiction of this appeal and that a substantial federal question is here presented.

OPINION BELOW

The opinion and final judgment of the District Court for the Eastern District of Arkansas, Western Division, dated June 18, 1959, are reported in 173 F.Supp. 944, and a copy is attached as Appendix A hereto. Notice of Appeal was filed in said court on August 13, 1959.

JURISDICTION

The jurisdiction of this court to review on appeal this final judgment of the District Court is conferred by 28 U.S.C. Section 1253 (Act of June 25, 1945, C. 646, 62 Stat. 926), which provides for direct appeals, as a matter of right, to this court from judgments of three-judge district courts.

Cases which sustain the jurisdiction of this court to review on appeal such final judgments of District Courts are *Herkness v. Irion, La.*, 278 U.S. 92, 49 S.Ct. 40, 73 L.Ed. 198; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 54 S.Ct. 732, 78 L.Ed. 1318; *Palmetto Fire Ins. Co. v. Conn.*, 272 U.S. 295, 47 S.Ct. 88, 71 L.Ed. 243; *Radio Corp. of America v. U. S.*, D. C. Ill. 1950, 95 F.Supp. 660, aff'd 341 U.S. 412, 71 S.Ct. 806, 95 L.Ed. 1062; *Wilentz v. Sovereign Camp, W.O.W.*, 306 U.S. 573, 59 S.Ct. 709, 83 L.Ed. 994.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are:

A. Section 1 of the Fourteenth Amendment to the Constitution of the United States.

B. The Tenth Amendment to the Constitution of the United States.

C. Section 4 of Article 14 of the Constitution of the State of Arkansas, copy attached hereto as Appendix B.

STATE STATUTES INVOLVED

The statutes of the State of Arkansas involved in this appeal are as follows:

Act No. 4 of the Sixty-first General Assembly of Arkansas, Second Extraordinary Session, 1958, copy attached hereto as Appendix C.

The proclamation of the Governor of the State of Arkansas involved in this appeal pursuant to Act No. 4 of the State of Arkansas, dated September 12, 1958, copy attached hereto as Appendix D;

Act No. 5 of the Sixty-first General Assembly of Arkansas, Second Extraordinary Session, 1958, as amended by Act 151 of the Arkansas Acts of 1959, copies attached hereto as Appendix E.

COURT DECISIONS INVOLVED

The opinion of the Supreme Court of the State of Arkansas of April 27, 1959, in *Garrett* v. *Faubus*, 323 SW-2d 877, holding Act. No. 4 valid as not in conflict with either the Constitution of Arkansas or the Constitution of the United States, copy of opinion attached hereto as Appendix F.

The opinion of the Supreme Court of the State of Arkansas of May 4, 1959, in *Fitzhugh* v. *Ford*, 323 SW2d 559, holding Act No. 5 valid as not in conflict with the Constitution of Arkansas, copy of opinion attached hereto as Appendix G.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Did the District Court err in adjudging Act 4 of the Second Extraordinary Session of the Sixty first General Assembly of Arkansas, 1958, to be unconstitutional and invalid under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States?

2. Did the District Court err in adjudging the Proclamation of the Governor of Arkansas, dated September 12, 1958, closing the public high schools in Little Rock to be void?

3. Did the District Court err in adjudging Act 5 of the Second Extraordinary Session of the Sixty-first General Assembly of Arkansas, 1958, as amended by Act 151 of 1959, to be unconstitutional and invalid under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States?

4. Did the District Court err in adjudging the transfer of funds under Act 5 to be an unconstitutional and invalid diversion of funds and permanently enjoining the same?

5. Did the District Court err in permanently enjoining the defendants from enforcing Acts 4 and 5 of the Second Extraordinary Session of the Sixty

first General Assembly of the State of Arkansas, 1958?

STATEMENT OF THE CASE

This appeal came from further proceedings in the original case of *Aaron, et al* v. *Cooper, et al*, filed First in the District Court February 8, 1956. Following the judgment of this Court therein in *Aaron* v. *Cooper*, 358 U.S. 1, there became effective Acts 4 and 5 of the General Assembly of Arkansas, Second Extraordinary Session of 1958, effective September 12, 1958. Pursuant to Act No. 4, this appellant issued his proclamation closing certain high schools in Little Rock, Arkansas, following which the schools were closed. Pursuant to Act No. 5 (now amended by Act No. 151, of the Acts of the General Assembly of Arkansas for 1959) certain state funds were withheld from the Little Rock School District and used to provide educational facilities for students who would have normally attended the closed schools.

Plaintiffs Aaron and others then filed, after obtaining leave, their supplemental complaints praying Acts 4 and 5 be declared void for contravening the Fourteenth Amendment and asking this appellant and others be enjoined from enforcing same and that this, the Governor's proclamation under Act 4, be declared void and of no effect.

A three-judge court was convened pursuant to statute and after hearing entered its final judgment granting the relief prayed by plaintiffs, 173 F.Supp. 944.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The appellant urges that the judgment of the District Court should be reversed and the questions presented are

of such a substantial nature as to require plenary consideration for the following reasons:

1. The judgment of the District Court is in direct conflict with the decision of the Supreme Court of the State of Arkansas in *Garrett* v. *Faubus*, opinion delivered April 27, 1959, 323 SW2d 877, declaring Act No. 4 as valid and constitutional under both the State and Federal Constitutions, and with the decision of the Supreme Court of Arkansas in *Fitzhugh* v. *Ford*, opinion delivered May 4, 1959, 323 SW2d 559, declaring Act No. 5 valid under the State Constitution.

2. Affirmance of the judgment here appealed from will deny to the State of Arkansas, and the various school districts therein, their constitutional right, reserved to the State in the 10th Amendment to the Constitution of the United States, of exclusive control and jurisdiction over the operation of public schools within the State, when such right has been exercised without any discrimination prohibited by the Constitution of the United States and has been upheld as valid and proper by the highest court of the State.

GROUNDS UPON WHICH IT IS CONTENDED THAT THE FEDERAL QUESTIONS ARE SUBSTANTIAL AND THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN GRANTING THE INJUNCTION

On April 27, 1959, the Supreme Court of Arkansas held Act 4 to be constitutional as a valid exercise of the State's Police power under both the State and Federal Constitutions. In a well reasoned opinion, the court cited many cases in support of its holding that it has long been settled law that the Fourteenth Amendment does not take

away from a state the police powers reserved to it upon adoption of the Federal Constitution. The principle was tersely enunciated by Justice Story in *Prigg* v. *Pennsylvania*, 41 U.S. 539 (16 Pet. 539, 625), 10 L.Ed. 1060:

> ". . . it is proper to state that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the States in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the States, and has never been conceded to the United States."

and in the case of *Terrace* v. *Thompson*, 263 U.S. 197, 217, 68 L.Ed. 274, 44 S.Ct. 15, as follows:

> "The Fourteenth Amendment . . . does not take away from the State those powers of police that were reserved at the time of the adoption of the Constitution . . . And in the exercise of such powers the State has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace and good order of its people."

Every presumption must be indulged in favor of the constitutionality of a legislative act which will not be declared unconstitutional by the courts unless the conflict between it and the Constitution is clear and palpable. This principle is uniformly applied in the federal courts.

"State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared." *Davis Warehouse Co.* v. *Bowles*, 321 U.S. 144, 88 L.Ed. 635, 64 S.Ct. 474. "Where repugnancy between a law and the Constitution is not established beyond a reasonable doubt, the court usurps the legislative function if it presumes to adjudge the law void." *National Maritime Union* v. *Herzog*, 78 F.Supp. 146 (D.C. Dist. of Columbia), aff'd 334 U.S. 854, 92 L.Ed. 1776, 68

S.Ct. 1529. "A state statute may not be annulled as violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment unless it is palpably in excess of legislative power."

In *Kovacs v. Cooper*, 336 U.S. 77, 93 L.Ed. 513, 69 S.Ct. 448, it was held that "courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity". In *Local 333B United Marine Div. of International Longshoremen's Assn. v. Battle*, 101 F.Supp. 650, aff'd 342 U.S. 880, 96 L.Ed. 661, 72 S.Ct. 178:

> "A strong presumption exists in favor of the validity of a state statute which is attacked on the ground that it contravenes the federal constitution or a federal statute."

In *Harlow v. Ryland*, 78 F.Supp. 488, affirmed 172 F.2d 784, there was involved the constitutionality of an Arkansas statute. In upholding the statute, the Court said:

> "A state possesses all legislative power consistent with a republican form of government except as restrained by its own Constitution, or the federal Constitution, hence each state, when not so restrained, may provide not only for health, morals, and safety of its people, but for the common good, as involved in well-being, peace, happiness, and prosperity of people."

If we assume the presumption in favor of the constitutionality of Act 4, the sole issue then is simply whether the State Legislature had the power to enact the legislation in question. In considering the wide police power accorded the legislative body under the Fourteenth Amendment, this Court in *Everson v. Board of Education*, 330 U.S. 1, 91 L.Ed. 711, 67 S.Ct. 504, 512, said:

> "We must consider the New Jersey statute in accordance with the foregoing limitations imposed

> by the First Amendment. But we must not strike that statute down if it is within the state's constitutional power even though it approaches the verge of that power."

and more recently, in *Lambert* v. *California*, 355 U.S. 225, 2 L.Ed. 2d 228, 78 S.Ct. 240:

> "The rule that 'ignorance of the law will not excuse' . . . is deep in our law, as is the principle that of all the powers of local government, the police power is 'one of the least limitable' (citing *District of Columbia* v. *Brooke*, 214 U.S. 138.)"

See also *Lacoste* v. *Department of Conservation, State of Louisiana*, 263 U.S. 545, 68 L.Ed. 437, 44 S.Ct. 186:

> "The Fourteenth Amendment does not interfere with the proper exercise of the police power."

And *Liggett Company* v. *Baldridge*, 278 U.S. 105, 73 L.Ed. 204, 49 S.Ct. 57:

> "The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment, only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of general welfare."

See also *Asbury Hospital* v. *Cass County, North Dakota*, 326 U.S. 207, 90 L.Ed. 6, 66 S.Ct. 61, holding that the Fourteenth Amendment does not preclude a state from excluding a foreign corporation from doing business or holding property within it. Earlier cases are *Proprietors of Charles River Bridge* v. *Proprietors of Warren Bridge*, 36 U.S. 420, 11 Pet. 420, 9 L.Ed. 773; *City of New York* v. *Miln*, 36 U.S. 102, 9 L.Ed. 648, 11 Pet. 102; *Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36, 21 L.Ed. 394; *Munn* v. *Illinois*, 94 U.S. 113, 24 L.Ed. 77; *Patterson* v.

Kentucky, 97 U.S. 501, 24 L.Ed. 1115; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U.S 659, 24 L.Ed. 1036.

In the District Court, the appellees alleged and argued that the legislation involved is unconstitutional and void on its face. They also inferentially impugned the motives of not only the legislative body in enacting the legislation, but that of the Governor in carrying out his duty under the Acts. The answer to this is succinctly expressed in the case of *Shuttlesworth* v. *Birmingham Board of Education*, 162 F.Supp. 372, 381 aff'd 358 U.S. 101, as follows:

> "The Plaintiffs would have us conclude without further ado 'that the whole intent is to continue the system of separate schools for Negro and white in the State of Alabama'. In dealing with an Act of the legislature of a sovereign State, we cannot lightly reach such a conclusion, nor, indeed, are we permitted to do so except upon the most weighty and compelling of reasons.
>
> "In testing constitutionality 'we cannot undertake a search for motive'. 'If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into'. *Doyle* v. *Continental Insurance Co.*, 94 U.S. 535, 541, 24 L.Ed. 148. As there is no one corporate mind of the legislature, there is in reality no single motive. Motives vary from one individual member of the legislature to another. Each member is required to 'be bound by Oath or Affirmation to support this Constitution'. Constitution of the United States, Article VI, Clause 3. Courts must presume that legislators respect and abide by their oaths of office and that their motives are in support of the Constitution.
>
> "If, however, we could assume that the Act was passed by the legislature with an evil and unconstitutional intent, even that would not suffice. As executive officers of the State, the members of the

> defendant Board are likewise required to 'be bound by Oath or Affirmation to support this Constitution'. Constitution of the United States, Article VI, Clause 3. No court, without evidence, can possibly presume that the members of the defendant Board will violate their oaths of office."

It is a cardinal principle of constitutional construction that the Court must look to the statute itself to determine the legislative meaning.

It was urged below that the entire superstructure of State action rests upon and becomes operative only in the event of one thing. That is, the integration of white and Negro children in a public school. In this connection it is important to note what has and has not been done under Act 4.

The pertinent provisions of the Act command the Governor to order any school closed immediately *where he determines that domestic violence is imminent* and that a general, suitable, and efficient educational system cannot be maintained. The proclamation issued by the Governor on September 12, 1958, a copy of which appears as Appendix D herein, provides:

> "... Whereas, I have determined that domestic violence within Little Rock School District is impending, and that a general, suitable, and efficient educational system cannot be maintained in the senior high schools of the Little Rock School District because of integration of the races in such schools;
>
> "Now, therefore, I, Orval E. Faubus, Governor of the State of Arkansas, acting under the applicable provisions of the aforementioned 'Act No. 4 of the Acts of the Second Extraordinary Session of the Sixty-first General Assembly, approved September 12, 1958, do hereby order by public proclamation that:

"(A) The public senior high schools of the Little Rock School District are hereby ordered closed pursuant to said Act, effective at 8 o'clock a.m., Monday, September 15, 1958."

In declaring the validity of Act 4 and the action of the Governor taken thereunder, the Supreme Court of Arkansas in *Garrett v. Faubus*, 323 SW2d 877, said:

"On September 12, 1958, the Governor, pursuant to the provisions of the above Act, ordered the Senior High Schools in the Little Rock School District closed as of September 15, 1958, at 8:00 o'clock a.m. The reasons given by the Governor for the closing order, as they are set out in his proclamation, were: *'I have determined that domestic violence within the Little Rock School District is imminent, and that a general, suitable, and efficient educational system cannot be maintained in the Senior High Schools of the Little Rock School District because of integration of the races in such schools.'*"

"Since Act 4 is unquestionably an attempt to exercise the police powers of the State about which more will be said later, and since this case comes to us on a demurrer, and since acts of the legislature are presumed to be constitutional, it is not incumbent on us to speculate on facts that might tend to invalidate this Act."

"It is our conclusion that no such constitutional violation exists. Article 14, Section 4, of our Constitution reads: 'The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided by the General Assembly.' Therefore, from a strictly constitutional standpoint, the legislature had the same right to authorize the Governor to take charge of schools as it has always exercised to authorize school boards to do so. *There is nothing in the Constitution requiring schools to be maintained on any fixed number at any fixed*

standard, or in any fixed places. If it did and if the requirements were those existing on September 27, 1958, then the Constitution has been flagrantly violated for more than 75 years following 1874."

"There is nothing in the record to show what reasons the Governor had for believing that the peace would be disturbed or that the lives of citizens and property of the district would be endangered, and certainly there is nothing in the record to show his reasons were not well founded. Such being the case *we will assume as we have previously pointed out, we may, that the Governor did not act capriciously.*" (Emphasis supplied.)

There is absolutely no evidence in this record the Governor did act capriciously. The conclusions of appellees, unsupported by any evidence, cannot supply this deficiency. Therefore, it must be assumed, as the Arkansas Supreme Court properly assumed, the Governor acted wisely in the exercise of his executive discretion. The fact that in acting to preserve the peace of the State the Governor disappointed the ambitions of the appellees is wholly beside the point.

In connection with the Governor's duty under the legislation in question to act in the interest and welfare of the people, the Arkansas Supreme Court in the *Garrett* case further said:

"If, in closing the schools temporarily, the Governor did so to protect the peace and welfare of the people, then he was justified, we think, under the well recognized police powers of the State. We believe that if the legislature had given the Governor the power to close schools temporarily in case of pestilence or insurrection in order to protect the people, no question of constitutionality would or could be raised. The difference between the real and the supposed situation is not one of law but of fact and the only difference in fact is one of degree.

> While the decisions dealing with *police power* are legion, the fundamental concept underlying its principle is no where better stated than in 11 Am Jur under the title *Constitutional Law*. In Section 251 it is stated: '. . . the police power is expressed by the well-known maxim, *solus populi est suprema lex*' (the welfare of the people is the supreme law). It has been said that this maxim is the foundation principle of all civil government and that for ages it has been a ruling principle of jurisprudence'. Also in the same text, Section 255, it is stated: 'The police power under the American constitutional system has been left to the states.' Numerous footnote cases are cited in the text to support both propositions.
>
> "It makes no difference, we think, whether threat of the welfare of the people arises out of a pestilence or out of certain concepts of life that had formed over a period of years — even though these concepts may be based, as some insist, on prejudice or emotions. We believe it is common knowledge that people are most disturbed over emotional matters. The existence and extent of the emotional matters involved in the matter under discussion are too well known to need amplification."

Apart from its approval by the Arkansas Supreme Court, Act 4 does not discriminate against any person. All senior high schools of the Little Rock School District were indiscriminately closed. The closing was not based upon the attendance at the schools of Negro students, but upon the fact that to keep the schools open would result in violence. That was the unquestionable determination made by the Governor, who alone had the right to make it.

No Federal court has ever held that a state or a school district must maintain schools, as was aptly pointed out by Justice Robinson, in his concurring opinion in *Garr* vs. *Faubus*, *supra*. This is manifestly demonstrated

Judge Parker's language in *Briggs* v. *Elliott*, 132 F.Supp. 776 (a three-judge court) in July, 1955, following the Supreme Court's decision in the *Brown* cases, where he said:

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attended different schools, as they attended different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals."

Also, as stated by Judge Bryan in *Thompson* v. *County Board of Arlington County*, 144 F.Supp. 239 (U.S. D.C., E.D. Virginia):

> "It must be remembered that the decisions of the Supreme Court of the United States in *Brown*

> v. *Board of Education*, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 and 1955, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083, do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of that Court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliance with ruling may well not necessitate such extensive changes in the school system as some anticipate."

All that this Court has ever said in this case, and all that the Court of Appeals said in its most recent decision in this case (261 F.2d 97), is that *if* public high schools are maintained in Little Rock, there can be no discrimination.

Obviously, whether the high schools must be kept open or maintained must be determined solely by the law of the State. Act 4 authorized the closing of the high schools, and they were all closed pursuant thereto. In the *Garrett* case, the Supreme Court of Arkansas in holding that the Act violates provisions of neither Federal nor State Constitutions, emphatically said:

> "There is nothing in the Constitution requiring schools to be maintained in any fixed number at any fixed standard or in any fixed places."

If State law does not require the schools to be maintained and kept open, and if the Federal law as declared by Judges Parker and Bryan (and as declared in all the segregation cases) does not require it, what law does require that the high schools be kept open? Since the State

law does not require their maintenance, there can be no discrimination in closing the schools under Act 4, *if all are treated alike under the closing.*

The Supreme Court of Arkansas in holding Act 4 valid took the view that it represented a reasonable and proper exercise of the police power of the State to meet a temporary emergency and, to quote from the opinion by Justice Ward, "to protect the peace and welfare of the people, and to effect a workable solution of the momentous problem all within the framework of the *Brown* opinion [*Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083]".

Although not directly enjoined in the District Court's order invalidating Act No. 5, as amended, since that Court did so merely with the statement that Act No. 5 is complementary to Act No. 4, and therefore equally unconstitutional, this appellent feels impelled to point out that no reason was shown below, and none was given by the District Court, why Act No. 5 is not valid.

The fact that Act 5 may, or may not, have been complementary to Act No. 4 is wholly beside the point. The prohibition against a search for the legislative motive enunciated in *Daniel* v. *Family Ser. Life Ins. Co.*, 336 U.S. 220, applies equally to Act No. 5 as well as to Act No. 4. The sole question is, whether Act No. 5, standing alone, is a valid exercise of the state's legislative power.

In the Court below, the evidence was undisputed that no discrimination, racial or otherwise, was practiced in the enforcement or administration of Act No. 5, as amended. None appears in the Act on its face. How, then, does it offend the Fourteenth Amendment?

It would seem that for this Court to hold that Act 5 as amended, is unconstitutional, it must affirmatively rule

that not only must the State open and maintain schools, but in doing so they must affirmatively require integration of the races in those schools. It is difficult to see what other result could follow from such a holding.

As aptly stated by the Supreme Court of Arkansas in *Fitzhugh v. Ford, Commissioner*, 323 SW2d 559:

> "It will be noted that Act 5 deals only with *State Funds* allocable to individual school districts. So, when a portion of the money allocated to a particular school district follows a student from that district to another school, the finances of no other school district are affected adversely. Legally this amounts to nothing more than transfering a student in one school district to a school in another district accompanied by this portion of the tax fund, which has long been sanctioned by legislative enactment and by this Court."

This comment made by the Supreme Court of Arkansas adequately answers the challenges made against the validity of Act No. 5. Also of interest is the comment of Mr. Justice McFaddin of the Arkansas Supreme Court, in his concurring opinion in *Fitzhugh v. Ford, supra*:

> ". . . . they (the schools) have been (closed); and in Act No. 5 the State has recognized its duty to provide education. Act No. 5 applies only to State funds—not to the millage funds voted in the school district."

If, as stated in the *Brown* decision and as reiterated by Judge Parker in *Briggs v. Elliott* and Judge Bryan in *Thompson v. County School Board*, the Constitution does not compel the mixing of the different races in the public schools, then certainly Act No. 5, as amended, is in harmony with these decisions. If it is a violation of the due process and equal protection clauses of the Federal Constitution to deny a student the right to attend school with a child of

another race, then certainly those constitutional safeguards must entitle either a colored or a white child to a right not to attend school with children of another race, as he so chooses. The due process and equal protection clauses must apply to all alike.

As stated by the Supreme Court of Arkansas (as shown above), no child, white or colored, is entitled to have State funds allocated to a particular school district for his education unless the legislature so directs. The withholding and reallocation of State funds goes to the student and not necessarily any particular school district. On the contrary, the several school districts themselves assess and levy taxes on a local basis for the support and maintenance of the public school systems. Ark. Const. Amend. 40. What the State may or may not contribute to the education of children is a matter wholly aside from the local obligation to support and maintain the schools. Thus, when a child removes from one school district into another, "legally this amounts to nothing more than transferring a student from one school district to a school in another district accompanied by his portion of the tax funds, which has long been sanctioned by legislative enactment and by this Court". *Fitzhugh* v. *Ford*, *supra*.

As shown above, Act No. 5 applies to all persons regardless of race, creed or color. There is not the slightest indication of racial discrimination anywhere in the Act, and no evidence of any in its administration.

Wholly apart from the validity of Act 4, the fact remains that the schools in question were closed. Under Act 5 certain funds were withheld from the district within which the closed schools were located, and paid out to other schools which provided education for students who would have attended the closed schools. This was purely State business, as pointed out by the Arkansas Supreme

Court in *Fitzhugh v. Ford, supra.* The Act provides for this payment to either public or private accredited schools, regardless of whether they be segregated or integrated, and regardless of the color of the student. In the *Fitzhugh case*, the Arkansas Supreme Court declared payments made either to public or private schools were within the Constitution of Arkansas, and since the handling of these State funds is purely State business, no federal question is involved. After the schools were closed, most of the students, as shown by the evidence, sought and gained admission elsewhere. We are cited to no authority that the legislature had no right to provide for this transfer and none that it had no right to provide that state funds could follow the student. Certainly, the federal courts cannot administer the schools in the State of Arkansas, nor control and regulate their finances. If the result sought by the plaintiffs and the Department of Justice be attained, the power of the State over the disposition of its funds granted in aid of education would be completely taken away. We know of no law, statutory or otherwise, that takes this power from the State and vests it in the federal government.

It might be said the principal complaint against Act 5 is that it may have made the results of Act 4 less dramatic. This is wholly beside the point. The only question is, does Act 5 in itself or in its administration discriminate, and the evidence here answers to the contrary. The vicious attack made in the District Court upon Act 5 by the appellees seems to reveal their true intent, which is not to secure any rights for these particular appellees and others similarly situated, but to produce the end result of complete integration of all schools in Arkansas. Therefore, in their view any factor that makes that result less attainable is *ipso facto* unconstitutional. It is obvious that the appellees are not deeply concerned with education but only with inte-

gration; otherwise they could find no basis for attack upon Act 5, treating, as it does, all alike and making its benefits available to all---these plaintiffs included. This is demonstrated graphically by the proof of fact that Act 5 has worked to the benefit of many colored students and that they have enjoyed its benefits, wholly free from any discrimination. Act 5 is attacked as bad, not because it discriminates but because it educates.

Notwithstanding, the District Court adjudged Act 4 and the proclamation issued by the Governor thereunder, and Act 5, as amended, as unconstitutional and void and of no effect.

Obviously, there is a clear and direct conflict between these decisions of the highest appellate Court of a State and that of a United States District Court in interpreting validity of State statutes under a challenge that it violates Amendment 14 of the Federal Constitution. A pressing and important question is here involved, the determination of which will have a direct and vital effect upon the rights of the State of Arkansas and the citizens thereof in enacting legislation necessary for the proper regulation of their schools.

The Tenth Amendment to the Constitution of the United States reserves to the State all powers not delegated to the United States or not prohibited to the State. Surely it cannot be denied that one of the powers thus reserved to the State is complete control over education, since nowhere is this delegated to the United States. Since neither Act here involved permits or causes any discrimination prohibited by the Fourteenth Amendment, to hold these acts invalid is a clear invasion of the powers of the State of Arkansas reserved to it under the Tenth Amendment.

Not only will the decision here affect the State of Arkansas, but resolving these questions will benefit other states with the same or similar problems.

CONCLUSION

It is submitted that the District Court erred in adjudging Acts 4 and 5 to be unconstitutional and the proclamation of the Governor of Arkansas issued under Act 4 to be void and of no effect. The effect of its decision raises federal questions of such a substantial nature and of such vital importance to the entire nation that this Court should accept the cause and this appeal for briefs on the merits and consideration on oral argument, so that proper rules of law may be announced for clarification and guidance in cases of this nature arising in the future.

Respectfully submitted,

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Little Rock, Arkansas

Attorneys for Appellant

ORVAL E. FAUBUS
GOVERNOR OF ARKANSAS

Dated at
Little Rock, Arkansas
October 6, 1959

CERTIFICATE OF SERVICE

I, Thomas Harper, one of counsel for the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of October, 1959, I served copies of the foregoing Jurisdictional Statement on the several parties thereto as follows:

(1) John Aaron, *et al.*, the Appellees herein by mailing a copy thereof in a duly addressed envelope with first class postage prepaid to their attorneys, Wiley A. Branton, Esq., 119 East Barraque Street, Pine Bluff, Arkansas; and by mailing a copy in a duly addressed envelope with Air Mail postage prepaid to Thurgood Marshall, Esq., 10 Columbus Circle, Suite 1790, New York 19, New York.

(2) On Ed L. McKinley, Jr., *et al*, Members of the Board of Directors, Little Rock School District, Appellees, by mailing a copy thereof in a duly addressed envelope with first class postage prepaid to their attorneys of record as follows: Herschel H. Friday, Jr., Esq., 1115 Boyle Building, Little Rock, Arkansas, and Robert V. Light, Esq., 1115 Boyle Building, Little Rock, Arkansas.

(3) On Marvin Bird, *et al*, Members of the State Board of Education of Arkansas, Appellees, by mailing a copy thereof in a duly addressed envelope with first class postage prepaid to their attorneys of record, Bruce Bennett, Esq., Attorney General of the State of Arkansas, Justice Building, Little Rock, Arkansas; and Harvey Z. Snell, Budget Director of the State Department of Education, Orvel M. Johnson, State Legislative Auditor, Jimmie Jones, State Auditor, J. Vance Clayton, State Treasurer, Appellees herein, by mailing a copy thereof in a duly addressed envelope with first class postag prepaid to

Bruce Bennett, Esq., Attorney General of the State of Arkansas, Justice Building, Little Rock, Arkansas.

(4) On the United States of America, as *amicus curiae*, by mailing a copy thereof in a duly addressed envelope with Air Mail postage prepaid to Honorable William P. Rogers, Esq., Attorney General of the United States, Department of Justice, Washington 25, D.C.; J. Lee Rankin, The Solicitor General, Department of Justice, Washington 25, D.C.; Osro Cobb, Esq., United States Attorney, Federal Building, Little Rock, Arkansas; W. Wilson White, Esq., and St. John Barrett, Esq., Department of Justice, Washington 25, D.C., its attorneys of record.

THOMAS HARPER
Kelley Building
Fort Smith, Arkansas
Counsel for Appellant

Dated at
Little Rock, Arkansas
October 6, 1959

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Civil Action No. 3113

John Aaron, et al., Plaintiffs, v. Ed L. McKinley, Jr., President, and Everett Tucker, Jr., Ben D. Rowland, Sr., Russell H. Matson, Jr., Robert W. Laster and Ted L. Lamb, Members of the Board of Directors, Little Rock School District, et al., Defendants.	DECISION.

Wiley A. Branton, Pine Bluff, Arkansas, and Thurgood Marshall, New York, N. Y., for plaintiffs.

Herschel H. Friday, Jr., and Robert V. Light, Little Rock, Arkansas, for defendants Ed L. McKinley, Jr., President, and Everett Tucker, Jr., Ben D. Rowland, Sr., Russell H. Matson, Jr., Robert W. Laster and Ted L. Lamb, Members of the Board of Directors, Little Rock School District; and Terrell E. Powell, Superintendent, Little Rock Public Schools.

Walter L. Pope, Little Rock, Arkansas, Kay Matthews, Little Rock, Arkansas, and Thomas Harper, Fort Smith, Arkansas, for defendant Orval E. Faubus, Governor of the State of Arkansas.

Bruce Bennett, Attorney General of the State of Arkansas, Little Rock, Arkansas, Ben J. Harrison, Assistant Attorney General of the State of Arkansas, Little Rock,

Arkansas, and Bill J. Davis, El Dorado, Arkansas, for defendants Marvin Bird, Allen Lynch, John G. Rye, M. P. Jones, Tom Whiteside, W. D. McKay, T. C. Cogbill, Jr., Dr. John Cole and Rabie Rhodes, Members State Board of Education of Arkansas; Arch W. Ford, Commissioner of Education of Arkansas; Harvey Z. Snell, Budget Director of the State Department of Education; Joe Hudson, Disbursing Officer of the State Department of Education; Orvel M. Johnson, State Legislative Auditor; Jimmie Jones, State Auditor; and J. Vance Clayton, State Treasurer.

Osro Cobb, United States Attorney, Little Rock, Arkansas, and St. John Barrett, Attorney, Department of Justice, Washington, D. C., for the United States of America, amicus curiae.

Before SANBORN, Circuit Judge, and MILLER and BECK, District Judges.

PER CURIAM.

This case was tried and argued to this statutory three-judge court on May 4, 1959, upon the issues raised by the supplemental complaint of the plaintiffs and the answers of the defendants. The action is a class action brought by school-age children of the Negro race and their parents and guardians, all residents of Little Rock, Arkansas. Declaratory and injunctive relief is sought against the defendants, State officers of the State of Arkansas, upon the claim that Act No. 4 of the Second Extraordinary Session of the Sixty-first General Assembly, 1958, of that State, pursuant to which the Governor on September 12, 1958, closed the four senior public high schools of Little Rock, both Negro and white, is unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and that Act No. 5 of the same Session, as later amended, by virtue of which state funds allocable to the Little Rock School District for the maintenance and operation of its

public schools have been withheld from the District and diverted to other schools, is likewise unconstitutional and void.

The defendants are the Governor of Arkansas, the State Commissioner of Education, the members of the State Board of Education, the Superintendent of the Little Rock Public Schools, the members of the Board of Directors of the Little Rock School District, and other State officers asserted to have a relation to the case.

In their suplemental complaint, the plaintiffs allege:

> "Acts No. 4 and 5, as amended by Act 151 of the Arkansas Acts of 1959, are part of a studied plan devised by the Governor and General Assembly of Arkansas to preserve racial segragation in the public schools and thus evade or frustrate compliance with the decision of the Supreme Court of the United States in the *School Segregation Cases* and, more specifically, the decrees of this Court, the Court of Appeals and the Supreme Court in the instant case. Each order of the federal courts to implement the constitutional rights of plaintiffs and others similarly situated to an unsegregated education has been met by action of the legislative and executive departments of Arkansas designed to nullify those orders. (Report of the Governor's Committee to Make Recommendations for Official Action, February 24, 1956; Constitutional Amendment No. 44 to the Constitution of Arkansas, adopted Nov. 6, 1956; Arkansas Statutes 1947, §§6-801 to 6-824; Arkansas Statutes 1947, §§80-1519 to 80-1525, Acts No. 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 of the General Assembly of Arkansas, 2nd Extraordinary Session 1958, approved September 12, 1958.)
>
> "The State of Arkansas has undertaken as a state function to provide a system of free public schools for the education for all persons between the

ages of six and twenty-one years. Arkansas Constitution Article 14, §1.

"Acts No. 4 and 5 as amended by Act No. 151 of the Arkansas Acts of 1959, in authorizing the closing of the public high schools of the Little Rock School District, the withholding of funds from them because they were in the process of being desegregated pursuant to Court order, and the payment of said funds to 'non-profit private' schools which enroll pupils who formerly attended the schools now closed, is designed to nullify the orders of this Court and to condition the maintenance of public schools upon their operation in an unconstitutional manner and upon the waiver by plaintiffs of rights secured to them by the Constitution of the United States, all in violation of rights, privileges and immunities guaranteed to plaintiffs by the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States."

The plaintiffs ask this Court to declare Act No. 4 and Act No. 5 as amended, unconstitutional; to enjoin the defendants and those in concert with them from enforcing or seeking to enforce the Acts in question; to enter a judgment ordering that the public schools in Little Rock be opened, operated and maintained on a nonsegregated basis in accordance with the previous orders of the United States Courts in that regard; and to enjoin the defendants from further acts to prevent the carrying out of said federal court orders.

The complete history of this controversy from its inception to September 12, 1958, has been stated by the Supreme Court of the United States in its opinion in *Cooper v. Aaron*, 358 U.S. 1, unanimously affirming the United States Court of Appeals for the Eighth Circuit in reversing an order of the United States District Court

suspending the approved plan of gradual integration for the period of two and one-half years.

The Supreme Court had on September 12, 1958, in that case, entered an order reading as follows (page 5 of 358 U.S.):

> "It is accordingly ordered that the judgment of the Court of Appeals for the Eighth Circuit, dated August 18, 1958, 257 F.2d 33, reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, 163 F.Supp. 13, be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated August 28, 1956, see 143 F.Supp. 855, and September 3, 1957, enforcing the School Board's plan for desegregation in compliance with the decision of this Court in *Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294, be reinstated. It follows that the order of the Court of Appeals dated August 21, 1958, staying its own mandate is of no further effect.
>
> "The judgment of this Court shall be effective immediately, and shall be communicated forthwith to the District Court for the Eastern District of Arkansas."

Upon the entry of that order, the Little Rock School Board and the Superintendent of Schools were again under mandate to carry out the approved plan of integration of the schools of Little Rock.

The further history of this litigation and its factual background is to be found in the opinion of the Court of Appeals for the Eighth Circuit, of November 10, 1958, in *Aaron* v. *Cooper*, 261 F.2d 97. That court points out that after its opinion of August 18, 1958 (257 F.2d 33) holding to be legally unwarranted the 2½-year suspension of the approved plan of integration granted by the District Court in 163 F.Supp. 13, the Governor of Arkansas called

the General Assembly into extraordinary session; that on August 26, 1958, it passed, with emergency clauses, the two Acts in question, which, however, were not signed by the Governor until September 12, 1958, the day the Supreme Court of the United States entered its order in *Cooper* v. *Aaron*, affirming the decision of the Court of Appeals for the Eighth Circuit, 257 F.2d 33; that on the same day, acting under the authority purported conferred upon him by Act No. 4, the Governor issued a proclamation closing all of the senior high schools of Little Rock, and called for an election in the School District, to vote on the alternative ballot proposition of "For Racial Integration of All Schools Within the School District" or "Against Racial Integration of All Schools Within the School District"; that Act No. 4 provided that, unless a majority of the qualified electors of the District voted in favor of integration, "no school within the district shall be integrated", and that a school closed by executive order authorized by the Act "shall remain closed until such executive order is countermanded by proclamation of the Governor"; and that the vote at the election was about 19,000 against, and 7,500 for, racial integration of all schools in the Little Rock School District (page 101 of 261 F.2d).

Speaking of Act No. 5, the Court of Appeals said on page 99 of 261 F.2d:

> "Act No. 5 was complementary to Act No. 4, in its provisions for withholding from a school district, in which the Governor had ordered a school closed, a pro rata share of the State funds otherwise allocable from the County General School Fund, and making such withheld funds available, on a per capita basis, to any other public school or any non-profit private school accredited by the State Board of Education (of which the Governor was a member), which should be attended by students of a closed

school, with an obligation being imposed upon the State Board of Education in these circumstances to make such payments. §§2 and 3."

While the Court of Appeals expressed no opinion with respect to the constitutionality of Acts No. 4 and 5, it ruled that the Little Rock School Board, which was under mandate of the federal District Court to effectuate the plan for the gradual integration of the public schools of Little Rock approved by that Court in *Aarno* v. *Cooper*, 143 F.Supp. 855 (aff'd in *Aaron* v. *Cooper*, 243 F.2d 361), could not lease the high school buildings of the District to a Private School Corporation for the operation of schools on a segregated basis, nor could the School Board otherwise disable itself from carrying out the court-approved plan of integration.

The District Court was directed by the Court of Appeals to enjoin the School Board, its members, and their successors, from transferring the high schools or other property of the District for the carrying on of any segregated school operations of any nature and to provide that the Board and its members and their successors "shall take such affirmative steps as the District Court may hereafter direct, to facilitate and accomplish the integration of the Little Rock School District in accordance with the Court's prior orders" (page 108 of 261 F.2d).

The Supreme Court of Arkansas on April 27, 1959, by a four-to-three majority, in the case of *Garrett* v. *Faubus, Governor of Arkansas*, Ark. , 323 S.W. 2d 877, held that Act No. 4 did not conflict with any provision of the Constitution of the State of Arkansas or with the Constitution of the United States. Justice Ward wrote the opinion of the Court. Justice Robinson and Chief Justice Harris each wrote a concurring opinion.

The four justices of that Court who believed that the Act was valid both under the Constitution of Arkansas and the Constitution of the United States were of the view that the Act represented a reasonable and proper exercise of the police power of the State to meet a temporary emergency, and — to quote from the opinion of Justice Ward — "to protect the peace and welfare of the people, and to effect a workable solution of this momentous problem [integration of the schools] all within the framework of the *Brown* opinion [*Brown v. Board of Education*, 347 U.S. 483; 349 U.S. 294]."

Justice Robinson, in his concurring opinion, had this to say (page 892 of 323 S.W.2d):

> "* * * In order to prevent violence that would be brought about by sending the Negro children to White schools, and to prevent the use of armed troops in the school buildings and on the school grounds, the Legislature authorized the Governor to close the school affected. But, undoubtedly, the General Assembly felt that if a majority of the voters, including Negro voters (who constitute a large percentage of the total electors in Little Rock), felt that the schools should be opened, then the schools could be conducted without the use of troops and United States Marshals. Act No. 4, therefore, provides for an election to determine if the people wanted the schools opened. Such an election was held, and the vote was overwhelming in favor of keeping the schools closed." [*]

Chief Justice Harris was also of the view that Act No. 4 represented a valid exercise of the police power of the

* It is to be noted that the only choice given voters under Act No. 4 was to vote either for or against "Racial Integration of All Schools * * *," and not upon the question of having the schools open or closed.

State to meet a situation "sufficiently inimical to the public safety and welfare to justify the legislation * * * ".

Justice McFaddin, in his dissenting opinion, expressed the view that Act No. 4 was violative of Section 1 of Article 14 of the State Constitution providing that "* * * the State shall ever maintain a general, suitable and efficient system of free public schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction", and opposed to decisions of the Arkansas Supreme Court construing that provision of the Arkansas Constitution.

Among other things, Justice McFaddin said (page 900 of 323 S.W.2d):

> "* * * If the People of Arkansas want to strike Art. 14 from the Constitution, then the schools may be closed under some legislation similar to Act No. 4. But until Art. 14 of the Constitution is repealed, then it is my solemn and sincere view that Act No. 4 is violative of the Arkansas Constitution."

He expressed the view that the police power of a state may not be used to invade or impair the liberty of citizens guaranteed by the State Constitution, and said: "In short, the Arkansas Legislature cannot under the guise of the police power, enact legislation contrary to the Arkansas Constitution." He stated that the situation with which the Court was dealing was not the kind of an emergency that permits the use of "Emergency Police Powers," and further said, in that regard: "Rather, we are dealing with a condition that has already existed since 1954 and will continue to exist until either the United States Constitution is amended or the United States Supreme Court overrules *Brown v. Board of Education*."

Apparently, all of the State Justices were agreed that Section 1 of Article 14 of the Constitution of Arkansas

requires the continued maintenance by the State of free public schools. In Justice Ward's opinion, in which Justice Robinson and Chief Justice Harris concurred, it is said (pages 880-881 of 323 S.W.2d):

> "* * * If Act 4 is viewed as giving the Governor the power to close all public schools permanently, it would, we concede, be in violation not only of the decree in the *Brown* case [*Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294] but also of the State Constitution, but we do not consider it that way. * * * we take it as well understood that the Act was intended to slow down the implementation of integration until it could be accomplished without great discomfort and danger to the people affected or until a lawful way could be devised to escape it entirely.* * *"

As we read the opinion of the Supreme Court of the United States in *Cooper* v. *Aaron*, 358 U.S. 1, it, in effect, holds that no lawless violation or threat, fear or anticipation of such violence, resulting from hostility to the integration of its schools, can justify any State, under the guise of the exercise of its police power, in depriving citizens, either temporarily or permanently, of rights guaranteed them by the Constitution of the United States.

The Court said (pages 16-17 of 358 U.S.):

> "The constitutional rights of respondents [Aaron, et al.] are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: 'It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by

the Federal Constitution.' *Buchanan* v. *Warley*, 245 U.S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action.

"The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' *Ex parte Virginia*, 100 U.S. 339, 347. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia* v. *Rives*, 100 U.S. 313; *Pennsylvania* v. *Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230; *Shelley* v. *Kraemer*, 334 U.S. 1; or whatever the guise in which it is taken, see *Derrington* v. *Plummer*, 240 F.2d 922; *Department of Conservation and Development* v. *Tate*, 231 F.2d 615. In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can

neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.' *Smith* v. *Texas*, 311 U.S. 128, 132."

Mr. Justice Frankfurter, in his concurring opinion, said (pages 21-22 of 358 U.S.):

"The use of force to further obedience to law is, in any event a last resort and one not congenial to the spirit of our Nation. But the tragic aspect of this disruptive tactic was that the power of the State was used not to sustain law but as an instrument for thwarting law. The State of Arkansas is thus responsible for disabling one of its subordinate agencies, the Little Rock School Board, from peacefully carrying out the Board's and the State's constitutional duty. Accordingly, while Arkansas is not a formal party in these proceedings and a decree cannot go against the State, it is legally and morally before the Court.

"We are now asked to hold that the illegal, forcible interference by the State of Arkansas with the continuance of what the Constitution commands, and the consequences in disorder that it entrained, should be recognized as justification for undoing what the Board of Education had formulated, what the District Court in 1955 had directed to be carried out, and what was in process of obedience. No explanation that may be offered in support of such a request can obscure the inescapable meaning that law should bow to force. To yield to such a claim would be to enthrone official lawlessness, and lawlessness if not checked is the precursor of anarchy.

* * *"

See, also *Faubus* v. *United States*, 8 Cir., 254 F.2d 797, 807.

The deplorable conditions which were found by the Honorable Harry J. Lemley, United States District Judge, to have existed at Little Rock Central High School during the 1957-58 school year, when nine Negro students were enrolled in the formerly all-white school attended by about 2,000 pupils, and which he honestly and sincerely believed justified granting a 2½-year moratorium to the School Board in the carrying out of its plan of integration (163 F.Supp. 13), were held insufficient to support his order both by the Court of Appeals (257 F.2d 33) and by the Supreme Court of the United States (358 U.S. 1). If the factual situation as found by Judge Lemley, whose fact findings have never been questioned, were insufficient to sustain his order, we can see no basis whatever for a ruling by us that Act No. 4 constitutes a valid and reasonable exercise of the police power of Arkansas to meet an emergency.

> "* * * Every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class." *Plessy* v. *Ferguson*, 163 U.S. 537, 550. See and compare, *Yick Wo* v. *Hopkins*, 118 U.S. 356.

With all due respect to the considered views of those Justices of the Supreme Court of Arkansas who concluded that Act No. 4 represented a valid exercise of the police power of the State and therefore did not violate the Fourteenth Amendment to the Constitution of the United States, we are firmly of the opinion that Act No. 4 cannot be sustained upon that ground, and is clearly unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment, and conferred no authority upon the Governor to close the public high schools in Little Rock.

The Supreme Court of Arkansas, in the case of *Fitzhugh* v. *Ford, Commissioner*, ... Ark. ....., 323 S.W.2d 559, in a unanimous opinion filed on May 4, 1959, held that Act No. 5 violates no part of the Constitution of the State of Arkansas, but did not consider whether it violated any part of the Constitution of the United States. The Court said (page 560 of 323 S.W.2d):

> "In essence, Act 5 provides: (a) It requires the Commissioner of Education to withhold certain *State Funds* (otherwise allocable to a school district wherein a school has been closed under said Act 4) in an amount calculated on a certain pro rata basis, the correctness of which is not challenged. It requires the Commissioner of Education to pay over to other *public schools* or *non-profit private schools* accredited by the State Board of Education from the funds so withheld an amount calculated on a pro rata basis according to the number of students from the closed schools) attending a recipient school. Simply and briefly stated, Act 5 provides that the money which normally would be spent on a student in a closed school would be paid to the school which he might later attend."

Since Act No. 5 is complementary to and dependent upon Act No. 4, and that Act is invalid, it follows that Act No. 5 is also invalid and completely ineffectual. We are satisfied that Act No. 5, as amended, cannot stand alone and did not, and does not, authorize the State Board of Education to deprive the Little Rock School District of State funds allocable to it for the maintenance of its schools on a constitutional basis, or to divert any part of those funds to other schools or other districts.*

* Sections 2 and 3 of Act No. 5 of the Acts of the 2nd Extraordinary Session of the 61st General Assembly of Arkansas, approved September 12, 1958, as amended by Act No. 151 of the General Assembly for the year 1959, approved March 3, 1959, read as follows:

"Section 2. Whenever the Governor shall order any school to be closed, and continuing thereafter until such order shall

There is no dispute as to the facts. The Little Rock public high schools were closed by the Governor, under Act No. 4, on September 12, 1958, before they were opened for the admission of students, and have remained closed ever since. The School Board has been precluded, by the closing of the public high schools, from carrying out its approved plan of gradual integration ordered into effect by the federal courts.

By virtue of Acts No. 4 and No. 5, as amended, $350,586.00 in funds allocable to the Little Rock School District had been withheld up to May 4, 1959. The total amount which will be withheld by the end of the 1958-59 school year, if these Acts remain in effect, will be slightly in excess of $510,000. Of the funds withheld, $187,768.00 has been paid to other schools, public and private, in accordance with Act No. 5. Of this amount, $71,907.50 was paid to the private Raney High School.

The total number of prospective high school students registered for the four high schools in Little Rock as of September, 1958, was 3,665. Of these, after the closing of the high schools by the Governor, 266 white students and 376 Negro students did not attend any school; the remainder transferred to private schools in Little Rock and to public and private schools within or without the State. The evidence shows where the white students went and where the Negro students went, but we find it unnecessary to go into that detail.

The purpose, effect, and results of the enactment and

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have been countermanded by the Governor, or whenever any person of school age shall be accepted for enrollment in any school other than the one in which he normally would attend, the State Board of Education, acting through its Commissioner of Education, shall cause to be withheld from the State funds otherwise allocable to the school district having jurisdiction over any such closed school, or over any such school which any such

enforcement of Acts No. 4 and No. 5 are too obvious to require further discussion.

It is the judgment and declaration of this Court that Act No. 4 of the Second Extraordinary Session of the General Assembly of Arkansas, 1958, is unconstitutional and invalid; that the proclamation of the Governor of Arkansas closing the public high schools in Little Rock was and is void; that Act No. 5, as amended, as a device for depriving the Little Rock School District of State funds allocable to it for the maintenance of its schools upon a constitutional basis, is also unconstitutional and invalid; that the diversion of such funds pursuant to Act No. 4 and Act No. 5 should be and is hereby permanently enjoined; that the Superintendent of the Schools of Little Rock, and the members of the Board of Directors of the Little Rock School District, and their successors, are under the continuing mandate of this District Court to effectuate the plan of integration for the public schools of Little Rock approved by this Court in *Aaron v. Cooper*, 143 F. Supp. 855 (aff'd, 8 Cir., 243 F.2d 361); and that this Court has heretofore retained jurisdiction to require the Superintendent and the School Board to take such affirmative

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person of school age normally would attend, an amount equal to the proportion of the total of such State funds that the total average daily attendance of students for the next preceding school year in the closed school, or in the school which any such person would normally attend, bears to the total average daily attendance of all students of the district for said next preceding school year; plus, and also from State funds, an amount equal to the same foregoing proportion of ad valorem taxes collected in the calendar year next preceding the date of any such closing order, or next preceding the date of acceptance for enrollment of any such student in the school which he normally would attend, for the benefit of the said school district for maintenance and operation; plus, also from State funds, an amount equal to the same foregoing proportion of all funds allocable to the school district during the then current fiscal year from the County General School Fund, all as set forth in the budget of the County Board of Education.

steps as may hereafter be directed by this Court to accomplish the integration of the schools of Little Rock in accordance with and as required by the prior orders of this Court, and the orders and decisions of the Court of Appeals for the Eighth Circuit and of the Supreme Court of the United States.

It is further adjudged that the defendants and their successors in office be and are permanently enjoined from engaging in any acts which will, directly or indirectly, impede, thwart, delay or frustrate the execution of the approved plan for the gradual integration of the schools of Little Rock, the effectuation of which has been heretofore commanded by the orders of this Court.

The motions of the defendants to dismiss the supplemental complaint, which were taken under submission by the Court, are overruled.

Dated June 18, 1959.

JOHN B. SANBORN
United States Circuit Judge

JOHN E. MILLER
United States District Judge

AXEL J. BECK
United States District Judge

"Section 3. Should any of the students of any school so closed by order of the Governor, or any of students eligible to attend any racially integrated school, determine to attend, and attend, in this State, any other public school, or any non-profit private school accredited by the State Board of Education, then State funds so withheld as hereinbefore provided, shall be paid over by the State Board of Education to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of transferred students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds from time to time made available to the State Board of Education, including but not limited to those contained in Act 305, approved March 27, 1957, shall be useable for the purpose herein provided."

APPENDIX B

ARTICLE 14, SECTION 4 CONSTITUTION OF ARKANSAS

The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided for by the General Assembly.

APPENDIX C

ACT 4 OF 1958

AN ACT To Provide the Procedure Under Which the Governor May Order to be Closed the Schools of Any School District; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. The Governor shall, by proclamation filed with the Secretary of State, and with the Board of Directors of any school district affected, and with the County Board of Election Commissioners of the appropriate county:

(A) Order any school or all schools of the district to be closed immediately, and he is hereby specifically empowered to use all forces at his command to execute such order, and

(B) Call a special election to be held in the school district within thirty (30) days thereafter, whenever

(a) he shall determine that such action is necessary in order to maintain the peace against actual or impending domestic violence in any public school district, whereof the lives or limbs of the citizens, students, teachers or other employees of any school district; or the safety of buildings or other property in the school district are endangered; or

(b) integration of the races in any school, or all schools, of the school district has been decreed by an order of any court, and pursuant to the enforcement thereof, the President, or other officer of the United States Government, whether of the executive, legislative, or judicial branch, causes troops, whether regular troops or the federalized National Guard, United States Marshals, or other force at the federal level, to be stationed in, on or about any such public school; or

(c) he shall determine that a general, suitable, and efficient educational system cannot be maintained in any school district because of the integration of the races in any school within that district.

Section 2. (A) The proclamation of the Governor shall fix the date of the election, and the Governor shall give at least five (5) days notice of such election by publication by one (1) insertion in a newspaper either published in or having a bona fide circulation in the county or counties in which the school district is located.

(B) The County Board of Election Commissioners shall designate all polling places, provide the election supplies, appoint the judges and clerks for holding the election, and shall otherwise have supervision over the conduct of the election. At the close of the election, the judges at

each polling place shall make a return of the votes, certified by the clerks of the election, and file it in the office of the County Clerk of the County in which said district is administered, for immediate delivery to the County Board of Election Commissioners, which said Board shall immediately, but not later than the fifth (5th) day next following the election, proceed to ascertain and declare the result of the election and certify its findings to the Governor.

(C) At any such election, it shall not be necessary to have a ballot title, but there shall be printed on the ballot the following:

FOR RACIAL INTEGRATION OF ALL SCHOOLS WITHIN THE ☐ SCHOOL DISTRICT

AGAINST RACIAL INTEGRATION OF ALL SCHOOLS WITHIN THE ☐ SCHOOL DISTRICT

(D) The result of the election shall be proclaimed by the Governor, by proclamation, filed with the Secretary of State and with the Board of Directors of the school district in which such election was held.

(E) If a majority of the qualified electors of the district shall vote in favor of racial integration of all schools within the school district, then the Board of Directors of the district shall, with all deliberate speed after receipt of such proclamation, cause all such schools to be integrated; otherwise, no school within the district shall be integrated.

(F) Cost of publication of notice of the elections, and all other expenses incurred in relation thereto, shall be paid by the State.

Section 3. Should any member of the school board, or the superintendent, principal or any other supervisory personnel, of the district fail or refuse to immediately im-

plement the carrying out of, or carry out, the said closing order, the said failure or refusal shall be cause for immediate removal and the Governor shall declare the office or position of employment vacant; and thereupon the Governor shall, by appointment, fill any such vacancy until the next regular school election or for the remainder of the term of employment.

Section 4. Any school closed by executive order authorized by this Act shall remain closed until such executive order is countermanded by proclamation of the Governor filed with the Secretary of State and the Board of Directors of the school district.

Section 5. If for any reason any section or provision of this Act shall be held to be unconstitutional, or invalid for other reason, such holding shall not affect the remainder of this Act.

Section 6. It has been found and it is hereby declared by the General Assembly that a large majority of the people of this State are opposed to the forcible integration of, or mixing of the races in, the public schools of the State; that practically all of the people of this State are opposed to the use of federal troops in aid of such integration; that the people of this State are opposed to the use of any federal power to enforce the integration of the races in the public schools; that it is now threatened that Negro children will be forcibly enrolled and permitted to attend some of the public schools of this State formerly attended only by white children; that the President of the United States has indicated that federal troops may be used to enforce the orders of the District Court respecting enrollment and attendance of Negro pupils in schools formerly attended only by white school children; that the forcible operation of a public school in this State attended by both Negro and white children will inevitably result in violence

in and about the school and throughout the district involved endangering safety of buildings and other property and lives; that the state of feeling of the great majority of the people of this State is such that the forcible mixing of the races in public schools will seriously impair the operation of a suitable and efficient system of schools, and result in lack of discipline in the schools; that for said reasons it is hereby declared necessary for the public peace, health and safety that this Act shall become effective without delay. An emergency, therefore, exists and this Act shall take effect and be in force from and after its passage.

Approved: September 12, 1958

APPENDIX D

EXECUTIVE PROCLAMATION OF SEPTEMBER 12, 1958, ORDERING THE CLOSING OF ALL SENIOR HIGH SCHOOLS IN THE LITTLE ROCK SCHOOL DISTRICT

To all to whom these presents shall come, Greetings:

Whereas, Act No. 4 of the Acts of the Second Extraordinary Session of the Sixty-first General Assembly, approved Sept. 12, 1958, provides that the Governor: (A) order any or all schools of a school district to be closed immediately; and (B) call a special election within thirty days thereafter at which special election all qualified electors of the school district shall have an opportunity to vote for or against the proposition of racial integration of all schools within the school district, whenever the Governor shall determine that such action is necessary in order to maintain the peace against actual or impending domestic violence in the school district, or shall determine that a general, suitable and efficient educational system cannot be maintained in any school district because of integration of the races in any school of the district; and

Whereas, the Little Rock School Board has fixed Monday, Sept. 15, 1958, as the date for convening of classes in the senior high schools of said district and has been ordered by a Federal court to operate same on a racially integrated basis; and,

Whereas, I have determined that domestic violence within Little Rock School District is impending, and that a general, suitable and efficient educational system cannot be maintained in the senior high schools of the Little Rock

School District because of integration of the races in such schools:

Now, therefore, I, Orval E. Faubus, Governor of the State of Arkansas, acting under the applicable provisions of the aforementioned Act No. 4 of the Acts of the Second Extraordinary Session of the Sixty-first General Assembly, approved Sept. 12, 1958, do hereby order by public proclamation that:

(A) The public senior high schools of the Little Rock School District are hereby ordered closed pursuant to said Act, effective at 8 o'clock a. m., Monday, Sept. 15, 1958.

(B) That a special election be held in the Little Rock School District on Tuesday, Oct. 7, 1958, in the manner provided by law and said Act No. 4.

In witness whereof, I have hereunto set my hand and caused the Great Seal of the State of Arkansas to be affixed. Done in office on this twelfth day of September, 1958.

(signed) ORVAL E. FAUBUS,
Governor

C. G. (CRIP) HALL,
Sec. of State

APPENDIX E

ACT 5 OF 1958

AN ACT to Provide for the Withholding of a Portion of the State Aid Otherwise Allocable to a School District During the Period of Time Any School in Any Such District Shall Be Closed by Order of the Governor of This State; to Provide for the Payment from Any Funds So Withheld to Other Public Schools and Accredited Non-Profit Private Schools During the Period of Enrollment and Continuance of Study Therein of Any Students of Said Schools So Ordered to Be Closed by the Governor; to Authorize the State Board of Education to Adopt, and Enforce, Such Reasonable Rules and Regulations Not Inconsistent with the Provisions Hereof as it Shall Determine to Be Necessary or Desirable to Effectuate the Purposes and Intent of This Act; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

Section 1. Nothing in this Act contained shall be so construed as to alter, amend, or in any other manner change the method of determining the amount of State funds allocable to the public schools of a county, or of any school district therein, under the Minimum Foundation Program Law, or other applicable State aid school law, by reason of the closing of any school therein by order of the Governor of this State.

Section 2. Whenever the Governor shall order any school to be closed, and continuing thereafter until such order shall have been countermanded by the Governor, the State Board of Education, acting through its Commissioner

of Education, shall cause to be withheld from the State funds otherwise allocable to the school district having jurisdiction over any such school, an amount equal to the proportion of the total of such State funds that the total average daily attendance of students for the next preceding school year in the closed school bears to the total average daily attendance of all students of the district for said next preceding school year; plus, and also from State funds, an amount equal to the same foregoing proportion of ad valorem taxes collected in the calendar year next preceding the date of any such closing order for the benefit of the said school district for maintenance and operation; plus, and also from State funds, an amount equal to the same foregoing proportion of all funds allocable to the school district during the then current fiscal year from the County General School Fund, all as set forth in the budget of the County Board of Education.

Section 3. Should any of the students of any school so closed by order of the Governor determine to attend, and attend, in this State, any other public school, or any non-profit private school accredited by the State Board of Education, then State funds so withheld as hereinbefore provided, shall be paid over by the State Board of Education to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of transferred students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds contained in Act 305, approved March 27, 1957, shall be usable for the purposes herein provided.

Section 4. For the purpose of determining the amount of State funds so to be withheld, and thereafter paid out, after the date of any such continuing closing order, the State Board of Education, or the Commissioner of Educa-

tion, may call upon the Legislative Auditor, the State Comptroller, or other State officer or employee, to assist whenever auditorial assistance or advice shall be required.

Section 5. The State Board of Education shall have the power to adopt, and enforce, such reasonable rules and regulations not inconsistent with the provisions of this Act as it shall determine to be necessary or desirable to effectuate the purposes hereof.

Section 6. If for any reason any section or provision of this Act shall be held to be unconstitutional, or invalid for other reason, such holding shall not affect the remainder of this Act.

Section 7. It has been found and it is hereby declared by the General Assembly that a large majority of the people of this State are opposed to the forcible integration of, or mixing of the races in, the public schools of the State; that practically all of the people of this State are opposed to the use of federal troops in aid of such integration; that the people of this State are opposed to the use of any federal power to enforce the integration of the races in the public schools; that it is now threatened that Negro children will be forcibly enrolled and permitted to attend some of the public schools of this State formerly attended only by white children; that the President of the United States has indicated that federal troops may be used to enforce the orders of the District Court respecting enrollment and attendance of Negro pupils in schools formerly attended only by white school children, that the forcible operation of a public school in this State attended by both Negro and white children will inevitably result in violence in and about the school and throughout the district involved endangering safety of buildings and other property and lives; that the state of feeling of the great majority of the people of this State is such that the forcible mixing of the races

in public schools will seriously impair the operation of a suitable and efficient system of schools, and result in lack of discipline in the schools; that for said reasons it is hereby declared necessary for the public peace, health and safety that this Act shall become effective without delay. An emergency, therefore, exists and this Act shall take effect and be in force from and after its passage.

ACT 151 OF 1959

AN ACT to Amend Sections 2 and 3 of Act 5 of the Acts of the 2nd Extraordinary Session of the 61st General Assembly, Approved September 12, 1958; and for Other Purposes.

Whereas, the Supreme Court of the United States predicated its school integration decision upon the psychological effect of segregated classes upon children of the Negro race, and, at the same time, ignored the psychological impact of integrated schools upon certain white children who observe segregation of the races as a way of life: and

Whereas, legislation is necessary in order to protect the health, welfare, well-being, and educational opportunities of such white children;

Now therefore be it Enacted by the General Assembly of the State of Arkansas:

Section 1. Section 2 of Act 5 of the Acts of the 2nd Extraordinary Session of the 61st General Assembly of the State of Arkansas, approved September 12, 1958, is hereby amended to read as follows:

"Section 2. Whenever the Governor shall order any school to be closed, and continuing thereafter until such order shall have been countermanded by the Governor, or whenever any person

of school age shall be accepted for enrollment in any school other than the one in which he normally would attend, the State Board of Education, acting through its Commissioner of Education, shall cause to be withheld from the State funds otherwise allocable to the school district having jurisdiction over any such closed school, or over any such school which any such person of school age normally would attend, an amount equal to the proportion of the total of such State funds that the total average daily attendance of students for the next preceding school year in the closed school, or in the school which any such person would normally attend, bears to the total average daily attendance of all students of the district for said next preceding school year; plus, and also from State funds, an amount equal to the same foregoing proportion of ad valorem taxes collected in the calendar year next preceding the date of any such closing order, or next preceding the date of acceptance for enrollment of any such student in the school which he normally would attend, for the benefit of the said school district for maintenance and operation; plus, also from State funds, an amount equal to the same foregoing proportion of all funds allocable to the school district during the then current fiscal year from the County General School Fund, all as set forth in the budget of the County Board of Education."

Section 2. Section 3 of Act 9 of the Acts of the 2nd Extraordinary Session of the General Assembly of the State of Arkansas, approved September 12, 1958, is hereby amended to read as follows:

"Section 3. Should any of the students of any school so closed by order of the Governor, or any of the students eligible to attend any racially inte-

grated school, determine to attend, and attend, in this State, any other public school, or any non-profit private school accredited by the State Board of Education, then State funds so withheld as hereinbefore provided, shall be paid over by the State Board of Education to each said other public school or accredited non-profit private school in an amount equal to the same proportion of the total said State funds that the number of transferred students in any such public or private school bears to the total number of students upon which said withholding was made as hereinbefore provided. Appropriations of funds from time to time made available to the State Board of Education, including but not limited to those contained in Act 305, approved March 27, 1957, shall be useable for the purposes herein provided."

Section 3. If for any reason any section or provision of this Act shall be held to be unconstitutional, or invalid for other reason, it shall not affect the remainder of this Act.

Section 4. It has been found, and it is hereby declared by the General Assembly that a large majority of the people of this State are opposed to the limitation of attendance by students of the public schools of the State to the schools in which they are now enrolled, or may be eligible for enrollment; that such limitation of attendance results in dissatisfaction on the part of students, lack of interest and effort in their school curricula, and a psychological impairment of the health and welfare of such students; that private, accredited schools and other public schools are more suitable for such students than their resident schools; that the state of feeling of the great majority of the people of this State is such that inability to transfer freely to accredited private

schools and other public schools will seriously impair the operation of a suitable and efficient system of schools, the psychological well-being of the students, and result in lack of discipline in the schools; that for said reasons, it is hereby declared necessary for the public peace, health, and safety that this Act shall become effective without delay. An emergency, therefore, exists, and this Act shall take effect and be in force from and after its passage.

APPENDIX F

GARRETT v. FAUBUS, GOVERNOR

5-1824

Opinion delivered April 27, 1959.

Appeal from Pulaski Chancery Court, First Division; *Eugene Warren*, Special Judge; affirmed.

Kenneth Coffelt, for appellant.

Bruce Bennett, Atty. General, by: *Clyde Calliotte, Asst. Atty. General*, and *Walter Pope, Kay Matthews*, Little Rock and *Thomas Harper*, Ft. Smith, for appellee. *Thomas E. Downie, Amicus Curiae*, Little Rock.

PAUL WARD, Associate Justice. On this appeal it is contended that Act 4 of the Second Extraordinary Session of the 1958 General Assembly is in conflict with the constitution of Arkansas and the constitution of the United States.

Briefly and generally stated, said Act 4 gives the Governor the right to close any school or schools in any particular school district whenever: (a) He determines there is actual or impending domestic violence endangering lives or property; (b) Federal troops are stationed in, on or about a public school; (c) He determines an efficient educational system cannot be maintained because of integration of the races in school. The Act also provides: In the event of a closing, an election shall be held within 30 days and if a majority so vote the school or schools shall be opened on an integrated basis; If any superintendent, or other employee of the school fails to cooperate in carrying out the closing order he or they will be replaced by the Governor until the next regular school election; Any schools so closed shall not be reopened except by the Governor: If any section or provision of the Act is held unconsti-

tional it will not affect the remaining portions, and The provisions of the Act shall be activated by proclamation of the Governor. The emergency clause sets forth the reasons for the passage of the Act and its immediate effective date.

On September 12, 1958, the Governor, pursuant to the provisions of the above Act, ordered the Senior High Schools in the Little Rock School District closed as of September 15, 1958, at 8:00 o'clock a.m. The reasons given by the Governor for the closing order, as they are set out in his proclamation, were: "I have determined that domestic violence within the Little Rock School District is impending, and that a general, suitable, and efficient educational system cannot be maintained in the Senior High Schools of the Little Rock School District because of integration of the races in such schools."

On the same day the proclamation was issued, appellant, as a citizen and taxpayer, filed a complaint against the Governor alleging that Act 4 violated the Constitution of the United States and the Constitution of Arkansas, and particularly Article 14 of the latter Constitution. The prayer was that, in event the schools were closed, a mandatory injunction issue against the Governor directing him to vacate and nullify the proclamation. The court was also asked to enter a declaratory judgment construing the constitutionality of Act 4.

To the above complaint demurrers were filed by the Attorney General and also by appellee's private attorneys on the ground that the complaint failed to state a cause of action. The private attorneys also denied that the trial court had jurisdiction of appellee or the subject matter, and the Attorney General joined appellant in requesting a declaratory judgment. The trial court sustained the demurrer filed by the Attorney General, and dismissed the complaint—hence this appeal.

The only ground relied on by appellant for a reversal is thus stated in her brief:

"Act 4 of the Extraordinary Special Session of the General Assembly of Arkansas for 1958, is unconstitutional in that it violates Article 14 of the Constitution of Arkansas. Hence any act of the Governor based upon Act 4 is void for lack of constitutional authority, same being in violation of said Article 14 of the State Constitution."

The brief filed by *Amicus Curiae* attorneys, however, assumes that Act 4 will be considered in relation to both the State and Federal Constitutions and it is our purpose to do so.

Does the Act Violate the State Constitution? In our opinion Act 4 does not necessarily violate the State Constitution. We use the word "necessarily" advisedly. It is a well established principle of law that an Act of the Legislature which is constitutional on its face may become unconstitutional in its operation or under changed conditions. The landmark case announcing this principle is *Yick Wo* v. *Hopkins, Sheriff*, 118 U. S. 356, quoting from page 373:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." Essentially the same principle was announced by this court in *Board of Trustees, University of Ark.* v. *Pulaski County*, July 1, 1958, Vol. 103 L. R., 1027, in these words: "The principle is well settled that a statute may be valid when enacted but may become invalid by changes in the conditions to which it applies." In *Taylor* v. *City of Pine Bluff*, 226 Ark. 309, 289 S. W. 2d 679, we quoted with approval "that purposeful discrimination in the enforcement of an ostensibly fair law may violate the constitution. If the unlawful administration of the statute results 'in its unequal application to those who are entitled to be treated alike', there is a denial of equal protection." Since Act 4 is unquestionably an attempt

to exercise the police powers of the State about which more will be said later, and since this case comes to us on a demurrer, and since acts of the legislature are presumed to be constitutional, it is not incumbent on us to speculate on facts that might tend to invalidate this Act. In this connection, in the case of *Harlow* v. *Ryland*, 172 F. 2d 784, the court, in considering the validity of a statute said: "... it is not incumbent upon the court to find the actual existence of facts which would justify the legislation; but if a state of facts which would justify the legislation can reasonably be conceived to exist, the court must presume that it did exist and that the law was passed for that purpose."

The remaining question then is: Does Act 4, on its face, violate Section 1 of Article 14 of our State Constitution, as claimed by appellant? This section reads:

"Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction."

It is our conclusion that no such constitutional violation exists. Article 14, Section 4, of our Constitution reads: "The supervision of public schools and the execution of the laws regulating the same shall be vested in and confided to such officers as may be provided by the General Assembly." Therefore, from a strictly constitutional standpoint, the legislature had the same right to authorize the Governor to take charge of schools as it has always exercised to authorize school boards to do so. There is nothing in the Constitution requiring schools to be maintained in any fixed number at any fixed standard, or in any fixed places. If it did and if the requirements were those existing on September 27, 1958, then the constitution has been flagrantly violated for more than 75 years following 1874.

We have read with much interest the case of *Harrison* v. *Day*, 106 S. E. 2d 637, decided January 19th of

this year, where the Supreme Court of Virginia held several segregation acts in conflict with the constitution of that state. Section 129, Article 19, of the Virginia Constitution, in language essentially the same as in Section 1, Article 14 of our Constitution, requires the State to maintain a system of free public schools. However, Section 133 of Article 19 of their constitution places "The supervision of schools in each county and city . . . in a school, to be composed of trustees . . . ." *etc.* The court held that this provision prevented the legislature from placing the supervision in the Governor. Of course no such restriction is found in our constitution as we have already pointed out. It is interesting to point out that the Virginia Supreme Court, in considering an Act which permitted schools to be closed because of the presence of Federal Troops, had this to say: ". . . . While we agree that the State, under its police power, has the right under these conditions to direct the temporary closing of a school, the provision divesting the local authorities of their control and vesting such authority in the Governor runs counter to Section 133 of the Constitution."

We repeat that we find nothing in Act 4 which conflicts with Section 1, Article 14 of the Arkansas Constitution. The degree to which the police powers of the State may be extended will be further discussed later.

Regarding the United States Constitution. Technically speaking, the question posed for our solution is: Does Act 4 conflict with the first section of the 14th Amendment of the United States Constitution? This section, in substance, says: (a) All persons born or naturalized in the United States, and subject to its jurisdiction, are citizens; (b) No state shall make or enforce any law abridging the privileges or immunities of such citizens; (c) No state shall deprive such citizens of life, liberty, or property without due process of law, and; (d) No state shall deny such citizen equal protection of the laws. The Supreme Court of the United States in the case of *Brown, et al* v. *Board of Education of Topeka, et al.*, 347 U. S. 483 (on May 17, 1954) interpreted

said section to forbid discrimination in the public schools. Ordinarily, it seems, that should have ended the matter because the *law* had been declared, but it did not. The court must have realized that the dosage was too potent for immediate administration, for it said: " . . . because of the great variety of *local conditions*, the formulation of decrees in these cases presents problems of *considerable complexity*" (our emphasis). For the above reason the court continued the matter for several months and gave all states permitting segregation an opportunity to be heard. After another hearing, the Court (349 U. S. 294) on May 31, 1955, handed down its final decision. Apparently the Court still recognized the dosage was too potent to be taken at one time without harmful after effects. Among other things it said:

"These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination . . . ."

"Full implementation of these constitutional principles may require solution of *varied local school problems*. *School authorities have the primary responsibility* for elucidating, assessing, and solving these problems . . . ."

"*Because of their proximity to local conditions* and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal . . . ."

"In fashioning and effectuating the decrees, the courts will be guided by *equitable principles* . . . ."

"These cases call for the exercise of these traditional attributes of *equity power* . . . ."

"To effectuate this interest may call for elimination of a *variety of obstacles* in making the *transition* to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision . . . ."

"Courts of equity may properly take into account the *public interest* in the elimination of such obstacles in a systematic and effective manner . . ."

"Once such a start has been made, the courts may find that *additional time* is necessary to carry out the ruling in an effective manner . . ." (Our emphasis).

We have set out the above quotes because it appears that they delineate the only sphere of judicial discretion left to us. While we deeply deplore the fact that the Supreme Court of the United States did not follow the clear legal precedents announced in *Plessy* v. *Ferguson*, 163 U. S. 537, in *Gong Lum* v. *Rice*, 275 U. S. 78, and in numerous other decisions over a period of fifty years, instead of a long list of non-legal authorities, yet this Court will be subservient to the decision it did reach unless and until relief is afforded by the United States Supreme Court itself, by amendment to the Federal Constitution, by the intervention of Congress under Section 5 of the said 14th Amendment, or by some other means not readily apparent. Much has been said about the *supreme law of the land* in connection with the issue before us now. While we can see no room for argument since Article 6 of the United States Constitution itself says it, together with laws passed by Congress and certain treaties, "*shall be the supreme law of the land.*"

Our Field of Interpretation. Notwithstanding what we have said above concerning the *supreme law of the land*, we feel that the issue before us falls within a sphere which allows this court some judicial discretion. That sphere is the application of the *police powers* of the state to the implementation of the decision in the *Brown* case, *supra*.

First, let us make our position clear. If Act 4 is viewed as giving the Governor the power to close all public schools permanently; it would, we concede, be in violation not only of the decree in the *Brown* case but also of the State Constitution, but we do not consider it that way. Without extending this opinion unduly by recounting all the history preceding and leading up to the

passage of Act 4, we take it as well understood that the Act was intended to slow down the implementation of integration until it could be accomplished without great discomfort and danger to the people affected or until a lawful way could be devised to escape it entirely. In other words, the relief was intended to be temporary and not permanent. The terms of the Act itself bear out this interpretation.

There is nothing in the record to show what reasons the Governor had for believing that the peace would be disturbed or that the lives of citizens and property of the district would be endangered, and certainly there is nothing in the record to show his reasons were not well founded. Such being the case we will assume, as we have previously pointed out we may, that the Governor did not act capriciously.

If, in closing the schools temporarily, the Governor did so to protect the peace and welfare of the people, then he was justified, we think, under the well recognized police powers of the State. We believe that if the legislature had given the Governor the power to close schools temporarily in case of pestilence or insurrection in order to protect the people, no question of constitutionality would or could be raised. The difference between the real and the supposed situation is not one of law but of fact and the only difference in fact is one of degree. While the decisions dealing with *police power* are legion, the fundamental concept underlying its principle is no where better stated than in 11 Am. Jur. under the title *Constitutional Law*. In Section 251 it is stated: ". . . . the police power is expressed by the well known maxim '*solus populi est suprema lex*' (The welfare of the people is the supreme law). It has been said that this maxim is the foundation principle of all civil government and that for ages it has been a ruling principle of jurisprudence." Also in the same text, Section 255, it is stated: "The police power under the American constitutional system has been left to the states." Numerous footnote cases are cited in the text to support both propositions.

It makes no difference, we think, whether threat of the welfare of the people arises out of a pestilence or ... of certain concepts of life that had formed over a period of years — even though these concepts may be based, as some insist, on prejudice or emotions. We believe it is common knowledge that people are most disturbed over emotional matters. The existence and extent of the emotional matters involved in the matter under discussion are too well known to need amplification.

Not only are the emotions and concepts mentioned above very real in the lives of the people of many sections of the nation, including this state, but we think they have been permitted and even encouraged by the same court that authorized the *Brown* decision. A few excerpts from the opinions of the Supreme Court will suffice to explain. In the *Gong Lum* case, *supra*, where the court was dealing with the question of segregation, it said:

". . . the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of federal authorities with the management of such schools cannot be justified . . ."

In *Robinson and Wife v. Memphis & Charleston Ry. Co.*, 109 U. S. 3, we find:

". . . if the laws, themselves make any unjust discrimination, amenable to the prohibition of the 14th Amendment, congress has full power to afford a remedy under that amendment and in accordance with it."

Much of the language used by the Court in the *Plessy* case, *supra*, must have been reassuring to the people for nearly fifty years. Some expressions of the court are set out, *viz*:

(Page 544) "The object of the amendment (14th amendment U. S. Const.) was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to *abolish distinctions based upon color, or to en-*

force social as distinguished from political equality, or a *commingling of the two races upon terms unsatisfactory to each.*"

"Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the *state legislature* in the exercise of their *police power.*"

"The most common instance of this is connected with the establishment of *separate schools for white and colored* children, which has been held to be a *valid exercise of the legislative power* . . ."

(Page 550) "So far, then, as a conflict with the 14th amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a *large discretion on the part of the Legislature.*' In determining the question of reasonableness it is at liberty to act with reference to *establish usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.*"

(Page 551) "The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro *except by an enforced commingling of the two races.* We cannot accept this proposition. If the two races are to meet upon terms of social equality, *it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.*"

The court in speaking of integration of the races said:

". . . this end can neither be accomplished nor promoted by laws which *conflict with the general sentiment of the community* upon whom they are designed to operate." (Emphasis supplied in each instance).

In view of the overall situation as we have tried to point it out above, and having seen that the court itself in

the *Brown* case recognized some consideration must be given to local conditions and customs in the implementation of its opinion, we are driven to the conclusion that there is, and by law and common sense should be, a large sphere of action available to the State Legislature, under its police power, to guide the course of segregation so as to protect the public welfare. As before intimated, we are aware that neither this Court nor the legislature can over-ride permanently the integration mandate, but some one must guide a peaceable, safe course for its implementation. Under veto power of the Supreme Court of the United States, we believe this course can better be charted by those closest to the people affected and therefore better acquainted with local conditions. It is within this framework that we uphold the constitutionality of Act 4 under the *police power* of the State Legislature.

It is in this connection also that we desire to stress what our courts, including the Supreme Court of the United States, have heretofore said:

Barbier v. *Connelly* (1885) 113 U. S. 27, 5 Sup. Ct. 357

"But neither the amendment (14th) — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its *police power*, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

State v. *Mountain Timber Co.*, 75 Wash. 581, 135 Pac. 645

"Having in mind the sovereignty of the state, it would be folly to define the term. To define is to limit that which from the nature of things cannot be limited, but which is rather to be adjusted to conditions touching the common welfare, when covered by legislative enactments. The *police power* is to the public what the *law of necessity* is to the individual. It is comprehended in

the maxim, '*Salus populi suprema lex*'. It is not a rule; it is an evolution."

State v. *Hay*, 126 N. C. 999, 35 S. E. 459, 49 L. R. A. 588, 78 Am. St. Rep. 691

"'*Salus populi suprema lex*, — the public welfare is the *highest* law — is the foundation principle of all civil government' . . . . There is an implied assent on the part of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy, or even sacrificed, for the public good."

State v. *Boone*, 84 Ohio St. 346, 39 L. R. A. (NS) 1015

"The *police power* is inherent in sovereignty; and its exercise is justified by the necessity of the occasion. Its foundation is the right and duty of the government to provide for the common welfare of the governed. It is tersely expressed in the maxim, '*Salus populi suprema lex*'".

Davock, et al v. *Moore, Controller*, 105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783

"Whatever differences of opinion may exist as to the extent and boundaries of the *police power*, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and public morals. They belong emphatically to that class of objects which demand the application of the maxim, *Salus populi Suprema lex;* and they are to be attained and provided for by such appropriate means as the legislature may devise."

People v. *Linde*, 341 Ill. 269, 173 N. E. 361, 72 A. L. R. 997

"The power that the state may exercise in this regard is the overruling law of *necessity* and is founded upon the maxim, *Salus populi est suprema lex*. The ex-

istence and exercise of this power are an essential attribute of sovereignty, and the establishment of government presupposes that the individual citizen surrenders all rights the exercise of which would prove hurtful to the citizens generally."

Bland v. *People*, 32 Colo. 319, 76 P. 359, 65 L. R. A. 424, 105 Am. St. Rep. 80.

"'*The welfare of the people is the supreme law*', is a maxim of the law, and it is upon these two maxims that the *police power* of the state is largely based. In the exercise of the *police power* the *Legislature has a large discretion*, and it is our *duty* to sustain such legislation unless it is clearly and palpable and beyond all question in violation of the constitution." (Emphasis supplied in each instance).

That complete integration of the schools in many communities presents a social problem fraught with frightening consequences in the minds of many people is a fact that cannot be ignored or avoided. If those people are convinced they are being forced into acceptance, without time for adjustment, by a few people who are far removed from the scene and who, they feel, are not sympathetic or understanding, the problem becomes more frightening. On the other hand, if these same people were given assurance that they would be guided by understanding and sympathetic local officials, it would tend to allay their fears and also would, no doubt, hasten the day when a complete solution would be achieved with a measure of dignity, peace and harmony. It is in this concept that we rely so heavily on the police power of the State to protect the peace and welfare of the people, and to effect a workable solution of this momentous problem — all within the framework of the *Brown* opinion. It was to this end that Act 4 was passed by the legislature and it is to this end that we hold it is constitutional.

In speaking of the deep and disturbing feelings of the affected people, we take judicial notice of numerous elections where the people have expressed their feelings

in no uncertain terms, and also of the adoption of Amendment 44 to the State Constitution. Section 3 of that Amendment reads: "The General Assembly shall enact such laws under the police powers reserved to the states as may be necessary to regulate health, morals, education, marriage, good order, and to insure the domestic tranquility of the citizens of the State of Arkansas." Other portions of the amendment make it clear that the Legislature was not only empowered but was directed to protect the safety and welfare of the people.

In view of what we have said it follows that the decree of the trial court must be, and it is hereby affirmed.

Affirmed.

HARRIS, C. J. and ROBINSON, J., concur.

HOLT, MCFADDIN and GEORGE ROSE SMITH, JJ., dissent.

Concurring opinion delivered April 27, 1959.

CARLETON HARRIS, Chief Justice. The purpose of this concurrence is to state my own views relative to the Act here in question. My decision as to the validity of Act 4 is based purely and simply upon the State's police power. The right of the State to enact legislation as a means of protecting the health and safety of its citizens, is so well recognized as to really need no citation of authority, and this is true with reference to emergency legislation, though the legislative act may be in conflict with a constitutional provision. As stated in *Corpus Juris Secundum*, Vol. 16, Sec. 195, page 945:

"Legislation may be enacted under the police power, in seasons of emergency, which would not be appropriate at other times, and such legislation is not invalid merely because it necessarily works a hardship on some individuals for a period of limited duration; but emergency does not justify destruction. Emergency legislation ordinarily contains a declaration that an emergency exists which is causing widespread distress to a large portion of the population with resulting danger to health,

safety, or morals of the public generally, but the mere legislative declaration does not of itself create an emergency which will warrant the legislation. The actual existence of the emergency and not the limitation of the law's operation to a prescribed period, gives validity to an exercise of the police power, and when the emergency ceases to exist, the operation of the statute will be arrested, even though the prescribed term of its operation may not then have expired."

This doctrine has been followed in any number of cases, one of the most celebrated being *Home Building & Loan Ass'n.* v. *Blaisdell*, 290 U. S. 398, which case is cited in various decisions from state courts, including our own. The background is as follows. In 1933, this nation was in the throes of a terrible economic depression, and people who had mortgaged their homes, unable to pay the indebtedness for which the mortgages had been given, were losing their property through foreclosure proceedings. Various state legislatures enacted legislation designed to prohibit immediate foreclosure, and thus protect citizens from losing their homes. Among other states which enacted such legislation were Arkansas, Arizona, and Minnesota. The acts so passed by the General Assemblies of these states were attacked in the courts as unconstitutional, and Act 21 of the Arkansas General Assembly of 1933 was attacked on the ground that it was unconstitutional and void, because it conflicted with Section 17 of Article II of the Constitution of the State of Arkansas,* and further, the Act was in conflict with Section 10 of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts. This Court passed upon these contentions in the case of *Reiman* v. *Rauls*, 188 Ark. 983, 68 S. W. 2d 470, and in an Opinion written by the late Mr. Justice MEHAFFY, said:

"It is a matter of common knowledge that the present is a period of great depression, and that land values have decreased until there is practically no market for

*The pertinent part of Section 17 provides: "No bill of attainer, *ex post facto* law, or law impairing the obligation of contracts shall ever be passed."

such property. A home that was worth $2,500 when mortgaged to secure a debt some years ago would not bring at foreclosure sale more than one-fourth of this amount, and in many cases much less. There is not only no market for land, but practically all the banks in the country have failed, and it is impossible to borrow money secured by mortgage or pledge of property, to pay debts, and thousands of people in Arkansas who were making a living prior to the depression have lost their jobs, are without work, and without means of support. Governments are created for the purpose of securing the rights of the citizens, and, if a government, during a period of such depression as we now have, could not protect its citizens, there would be no reason for its existence.'"

The opinion then quoted from the opinion of the Minnesota Supreme Court in the *Blaisdell case* (which subsequently went to the United States Supreme Court) as follows:

"Emergency laws in time of peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war, earthquake, pestilence, famine, and fire, a combination of men *or the force of circumstances may, as the alternative of confusion or chaos,** demand the enactment of laws that would be thought arbitrary under normal conditions."

Under the view expressed therein, Act 21 was upheld as valid legislation. See also *Sewer Improvement District No. 1 of Wynne* v. *Delinquent Lands*, 188 Ark. 738, 68 S. W. 2d 80. In the case of *Poniquette* v. *O'Brien*, 55 Arizona 248, 100 P. 2d 979, the same question was before the court in 1937. In this case, the court refused to grant relief, because it said the emergency no longer existed, and held that the mortgage moratorium acts of 1937 and 1939 were unconstitutional as being in conflict with Section 10, Article I of the Federal Constitution. However, the court, in its language, clearly indicated that the legislation would have been upheld in 1933, and in a rather lengthy opinion, discussed the *Blaisdell* case. Inas-

*Emphasis supplied

much as the latter is a very lengthy opinion (consisting, with headnotes, of nearly 51 pages), and the reasoning is summarized quite well in the *Pouquette* case, I quote from the latter in explaining the reasoning of the United States Supreme Court in the former.

"The case is a long one and quotations therefrom sufficient to explain and substantiate our conclusions as to its meaning would extend this opinion to unreasonable length. After a careful analysis of the case and its reasoning, we think it clearly laid down the following principles: (a) Legislation of the kind involved in the various mortgage moratorium acts under consideration unquestionably violates section 10, Art. I of the Federal Constitution referred to. (b) There is implied, though not expressed, within the Federal Constitution a reservation of the police power to the states, which is superior to all specific provisions of that constitution and which may be called into play in periods of great public emergency, and when so called these police powers may temporarily only suspend the exercise of the specific powers or prohibitions of the constitution. As was stated in the *Blaisdell* case: 'Undoubtedly, whatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the state to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them. But it does not follow that conditions may not arise in which a temporary restraint of enforcement may be consistent with the spirit and purpose of the constitutional provision and thus be found to be within the range of the reserved power of the state to protect the vital interests of the community. It cannot be maintained that the constitutional prohibition should be so construed as to prevent limited and temporary interpositions . . . . . The existence of a public emergency justifying the suspension of the ordinary constitution-

al limitations is primarily for the legislature, but the determination of that branch of the government is not conclusive, and whether a law depending upon the existence of an emergency ceases to operate because the emergency had ceased is always open to judicial inquiry, notwithstanding the legislative declarations. Again and again through the opinion the court emphasizes the fact in varying language that in order to justify legislation like the mortgage moratorium acts there must exist a grave public emergency in the opinion of both the legislative and judicial branches of the government, and that when, in the opinion of the latter, the emergency which justifies the act has passed, of necessity the moratorium ceases to be effective, or, as it may be more emphatically put, becomes unconstitutional so far as future use is concerned."

The Minnesota Act was held valid in an opinion written by one of our greatest jurists, the late Chief Justice CHARLES EVANS HUGHES, in which the Court held that the emergency legislation was within the reserved power of the state to protect the vital interests of the community, did not violate the contract clause, the due process clause or the equal protection clause of the Federal Constitution, and the Chief Justice commented that a review of the court's decisions showed "a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." The opinion cited numerous United States Supreme Court decisions in support thereof.

It would therefore seem to me that the only question is whether the situation that existed in Little Rock in September, 1958, was sufficiently inimical to the public safety and welfare to justify the legislation here involved. In reaching a conclusion as to this matter, the Court will, of course, take judicial note of the conditions that existed at Central High School during the '57-58 school year. In commenting upon this situation, I do not primarily refer to the chaotic conditions existing outside the building, *i.e.*, the crowds that had gathered in protest. I mainly have reference to those conditions that existed

inside the school, and which were a daily part of student life. Let it first be said, that as far as I know, this is the first time in the history of this nation that troops have patrolled the halls or corridors of a school. I have divers times deliberated as to just how much education a teen-age boy or girl could acquire under such circumstances, and in addition, the frequent threat of bombings, and the systematic search through the lockers and other school property for possible bombs. Conditions could not have been more abnormal, and I am persuaded that the average student could not but be adversely affected by such tense and unusual conditions.

With reference to the Governor's proclamation closing the schools, wherein it is stated "Domestic violence within the Little Rock School District is impending * * *", the attorney who filed with this Court a very fine *amicus curiae* brief, stated: "There is no proof whatever in the record to sustain this determination." I do not agree. No better criterion could be found than what had already happened. The very fact that the Federal Government deemed it necessary to place troops within the school, speaks louder than a thousand words. I need no better evidence than that the Federal authorities themselves recognized such an emergency as had not heretofore existed, else the troops would not have been sent, or would have been withdrawn once the crowds had melted away. To the contrary, such troops remained for the full school term of nine months, clear through graduation. However, this was not the end. At the time school was due to reopen, the Government sent in from over the county, various United States Marshals, and recruited and trained several dozen special deputy marshals to apparently perform the same duties that had previously been performed by the military. There, of course, was no occasion to recruit this force unless its use was contemplated. As stated in 16 C. J. S., Sec. 185:

"In the exercise of the police power legislatures may enact all laws necessary for the preservation of the rights of person and property from unlawful violence and disorder and the maintenance of good order throughout

the state. *Threatened disorders are equally subject to the police power as are actual disturbances of the public peace.**

I cannot even remotely understand, nor comprehend, how any individual could contend that conditions were not such as required the use of the State's police power for the purpose of maintaining peace, good order, and the safety of the students of the senior high schools of Little Rock; in fact, I do not consider it necessary that the situation reach the proportions, or magnitude, herein pointed out, before such legislation would be justified.

This Court has previously, even without the conditions herein cited, given the Legislature great leeway in controlling the subject of education. For instance, in *Krause* v. *Thompson*, 138 Ark. 571, 211 S. W. 925, the validity of a statute was questioned which provided for the consolidation of three school districts, and further provided:

"Until such time as the patrons of Pittsburg School District No. 41 and Oakland Special School District No. 19 which are hereby annexed to Lamar Special School District No. 38 shall by a majority petition request their discontinuance, public schools shall be taught in each for a period not exceeding seven months during each year at the places where schools have heretofore been taught and during such seasons as the patrons of a majority thereof may desire, and . . . . teachers shall be employed upon the recommendation of a majority of the patrons of each school and shall be paid the same salary as teachers in the public schools of Lamar are paid for like or similar services. . . . ."

This Court, in an opinion by the late Chief Justice McCULLOCH, said:

"The Statute is assailed in the first place on the ground that it violates section 1, article 14 of the Constitution which pledges the State to 'maintain a general, suitable and efficient system of free schools, whereby all

*Emphasis supplied

persons in the State between the ages of six and twenty-one years may receive gratuitous instruction'. If this section applies at all to the arrangement and management of school districts, it certainly does not hamper the Legislature in its control over that subject. We have frequently held that the legislative control over the organization of school districts and changes therein is supreme."

Several cases substantiating this statement are then cited.

It is asserted by counsel in the *amicus curiae* brief, that Act 4 was not emergency legislation, and the fact that an election is called for, which would be determinative of whether the schools should be reopened, is proof of that fact. May it simply be said that I consider subsection (b) of Section 1 (which calls for the election), to be mere surplusage. It adds nothing to the power given the Governor to close a school, and that authority is fully effective without the provision, or the subsequent provisions relating to the election. The gravamen of the attack on Act 4 is the authority given the Governor to *close* schools — not those provisions relating to the reopening of same.* A discussion, therefore, of the validity of those sections is unnecessary to a determination of the issue before us.

I feel that much could be added in support of the position herein taken, but to say more would only unduly prolong the opinion. This case has given me considerable concern, because of my deep-seated belief in public education. Perhaps that belief is, to some extent, predicated upon, and influenced by, the knowledge that except for our public school system, I should probably have

*Even if these portions of the Act be considered invalid, Act 4 contains a severance clause, Section 8, which recites that if any section or provision shall be held unconstitutional, such holding shall not affect the remainder of the Act. The late Justice Frank Smith, in a concurring opinion in the *Berman* case, said: "However, act 21 and much similar legislation passed at the same session of the General Assembly manifests the purpose to accord the debtor the greatest indulgence which may be granted, and it is, therefore, reasonably certain that the legislation would have been enacted even though Section 2 were eliminated. It is well settled that the unconstitutional portion of a statute may be stricken out without impairing the effect of the remainder where the provisions are wholly independent and it can be seen that the lawmakers would have enacted the remaining part of the statute . . ."

found it most difficult to obtain an adequate elementary or secondary school education. I am convinced that the same is true with reference to thousands of my fellow citizens. It has thus been personally difficult for me to reach this decision, but I always come back to the same thought, *viz.*, that education, under the conditions heretofore enumerated, cannot, even under the most elastic and flexible construction of the words, be considered "suitable" or "efficient" as provided by Article 14, Section 1, of our Constitution. The enthusiasm and energy of youth, which is used to such good advantage for the acquirement of knowledge in happy surroundings, as well be stifled in an environment of fear and restraint.

"To sum up and concisely state my views, the Legislature could not, in the face of the provisions of the State Constitution,* enact legislation abolishing the public school system, nor validly pass legislation closing *permanently* part of the schools.** But, as herein pointed out, the law is well established that constitutional provisions may be suspended during periods of great emergency, and this principle applies to the requirements of both the Federal and State Constitutions. The United States Supreme Court, in the *Blaisdell* case, held that Section 10, Article 1, of the Federal Constitution was violated by the mortgage moratorium act, there under attack, but nonetheless held such legislation valid because of the severe economic depression. In the litigation before us, we are not dealing with an economic crisis nor with financial losses but, to the contrary, with an emergency far more important the health, safety and welfare of hundreds of our young people. Can any court logically say (as has been said by the United States Court and this Court) that a suspension of constitutional requirements is right and proper when economy is at

*Section 1, Article 14. Intelligence and virtue being the safeguards of liberty and bulwarks of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the State between the ages of six and twenty-one years may receive gratuitous instruction."

**Of course, many school districts have been consolidated or annexed under legislative authority, where it appeared consolidation would be beneficial. The school term has been reduced for a limited number of years, and has been many times declared void.

fected—but not right and proper when the physical and mental well-being of our citizens is at stake? To ask the question is but to answer it.

It is impossible to say for what period of time emergency legislation can remain in effect. The Minnesota Act provided that its provisions should become inoperative a little more than two years after it was approved. The Arizona Court held that the emergency was over some four years after the passage of the original act, though it might possibly have held such legislation invalid earlier, had same been tested. I can only say that when conditions become sufficiently normal that a student can pursue his quest for learning in surroundings conducive to same — then the need for the extraordinary powers herein granted, will have ceased. Until that time, I am forced to conclude that the pertinent provisions of Act 4 are valid and lawful. I feverently hope that time will soon arrive, and I am convinced that a more sympathetic and realistic approach to the problems (engendered by the *Brown* decision) by the appropriate Federal authorities, will hasten that day.

Concurring opinion delivered April 27, 1959.

SAM ROBINSON, Associate Justice. I concur for the purpose of setting out in detail the reasons for my conviction that Act No. 4 of the Extraordinary Session of the General Assembly for the State of Arkansas for 1957 violates neither the Constitution of Arkansas nor the Constitution of the United States.

The first question is whether Act No. 4 violates Article 14 of the Constitution of Arkansas of 1874, copied from the Constitution of 1868, providing that the State must maintain free public schools. Does this provision of the Constitution mean that in any and all circumstances free public schools must be maintained? Does this provision of the Constitution mean that the State of Arkansas must maintain integrated schools? We know from the history of the times and particularly of the year 1874, when the present Constitution of Arkansas was adopted, that it was not the intention of the people

to compel the State to support integrated schools. The meaning of constitution guaranties never varies. *Village of Euclid, Ohio* v. *Ambler Realty Co.*, 272 U. S. 365, 71 L. Ed. 303, 47 S. Ct.

No one will deny that prior to 1874 there had been no integration of the races, in schools or otherwise, in the State of Arkansas. As shedding some light on the subject, the Arkansas Constitutional Convention of 1868, although composed to a large extent of people unfriendly to the customs and traditions of the people of this State, went on record as being opposed to any amalgamation of the races. Notwithstanding that those who appear to have been in control of the 1868 Constitutional Convention, as shown by the debates and proceedings of the Convention, were lately from Ohio, Canada, New Jersey, Iowa, Pennsylvania, Indiana, New York, Illinois, Scotland, the District of Columbia, England, and other states, and even though there was warm discussion in the Convention as to whether the Constitution of 1868 should contain a provision prohibiting marriages between races, there is no indication whatever that any member of the Convention thought there should be integrated public schools.

The Convention, on February 5, 1868, adopted a resolution as follows: "*Resolved*: That this Convention is utterly opposed to all amalgamation between the white and colored races, whether the same is legitimate or illegitimate. We would, therefore, recommend that the next General Assembly enact such laws as may effectually govern the same." By amalgamation the resolution has some meaning other than intermarriage between the races, because there was already in force and effect, and had been since February, 1838, a statute which is still in force and effect and which provides:

"All marriages of white persons with Negroes or mulattoes are declared to be illegal and void." Rev. Stat. Ch. 94, § 4.

In 1895, in the case of *Dodson* v. *State*, 61 Ark. 57, 31 S.W. 977, the validity of the intermarriage statute was challenged on the ground that it had been repealed by

implication by the Constitutions of 1864, 1868 and 1874 and the Fourteenth Amendment to the Constitution of the United States. The contention of unconstitutionality of the statute was based on the equal rights and privileges of citizenship and that the making of contracts is one of the rights and privileges of a citizen, and that a marriage being in the eyes of the law only a civil contract, the right and privilege of entering into such contract could not be lawfully abridged. In refusing to follow this reasoning, Chief Justice BUNN, writing the opinion of the Court, said: "It is not true that marriage is only a civil contract. It is more than that. It is a social and domestic relation, subject to the exercise of the highest governmental power of the sovereign state—the police power . . . . Nor does the continued existence of the prohibitory act depend on the rather uncertain foundation that its repeal cannot be asserted because, although in spirit repealed, yet, since this is only by implication, it must stand. The act is on a more solid foundation than that. If repealed in the way contended for, it involves a surrender by the people of one of the attributes of sovereignty. That cannot be attributed to the people, unless made by express declaration, if at all." The validity of the statute prohibiting intermarriages by members of the Negro and White races was upheld.

Maintenance of schools by the State means something more than teaching "the three R's". It forces a social status on the children. The manner of the operation of public schools necessarily compels social contacts by the students. There are many extracurricular activities involving social contacts that are necessary functions of schools, such as dramatics, where the students are subject to very close social contacts, athletics, school cafeterias, dances, P.T.A. meetings, and other social activities in which the students are more or less compelled to participate.

It has always been the practice in this State to maintain separate schools for White and Negro students, and so far as we have been able to ascertain, this is the first time it has ever been contended in any state court that

our Constitution compels the State to maintain integrated schools. This is the first time this Court has been called upon to say whether such construction should be placed on the Constitution. The federal courts, however, have heretofore had occasion to construe our Constitution, Article 14, and Ark. Stat. § 80-509, dealing with public schools. It was held, in *Pitts v. Board of Trustees of De Witt Spec. School Dist.*, 84 F. Supp. 975, that our statute, § 80-509, providing for separate schools for White and Colored persons, is not contrary to Article 14 of the Constitution of Arkansas.

Not only do we have segregated public schools, but we have separate industrial schools for Negro boys and White boys, and a Negro girls' training school, and a like school for White girls; and other public institutions in the State are segregated, such as the blind schools, the schools for the deaf, the State penitentiary and the State tuberculosis sanatariums.

Long acquiescence of policy pursued in every county in the State, and acts of the Legislature on the subject, are not without compelling force in reaching a conclusion as to the intention of the people when the Constitution was adopted. *Laurel Hill Cemetery v. City & County of San Francisco*, 216 U. S. 358, 54 L. Ed. 515, 30 S. Ct. 301. The Constitution belongs to the people. They can do what they like with it—they can amend it, they can repeal it, and they can construe it. Here the Court has the rare benefit of the constitutional provision under consideration having been construed by the people. The people have a right to say what the Constitution means, and in no uncertain terms, by means of Amendment No. 44, initiated and adopted by the people in 1957, and by the 1957 resolution adopted by the people, they have clearly shown that no provision of the Constitution of this State means that the State must maintain integrated schools. Amendment No. 44 and the Interposition Resolution of 1957 are set out in full as an appendix to this concurring opinion. Especially pertinent parts of the Amendment and the Resolution are as follows:

Amendment No. 44 provides:

"§ 1. Action by general assembly to protect states' rights.—From and after the Adoption of this Amendment, the General Assembly of the State of Arkansas shall take appropriate action and pass laws opposing in every Constitutional manner the Un-Constitutional desegregation decisions of May 17, 1954, and May 31, 1955, of the United States Supreme Court.

"§ 3. Regulation of health, morals, education, marriage and good order.—The General Assembly shall enact such laws under the Police Powers reserved to the States as may be necessary to regulate health, morals, education, marriage, good order and to insure the domestic tranquility of the citizens of the State of Arkansas.

"§ 5. All parts of the Constitution of the State of Arkansas in conflict with this Amendment be, and the same are, hereby repealed."

The Interposition Resolution provides:

"The People of Arkansas assert that the power to operate public schools in the State on a racially separate but substantially equal basis was granted by the people of Arkansas to the government of the State of Arkansas;

"The legislative, executive and judicial powers of the United States as granted under the Constitution shall not be construed to extend to the regulation of the public schools of any State nor to include a prohibition to any State, in the exercise of its power, to provide by its laws for the establishment, operation and maintenance of racially separate but substantially equal public schools within such State."

Amendment No. 44 is just as much a part of the Constitution as if it had been a part thereof from the

first. I don't see how anyone can read it and the Resolution of Interposition adopted by the people and then say that under the Constitution of Arkansas this State must provide and support integrated schools. In my opinion such construction by the Court would be judicial usurpation of unauthorized power.

The next question is whether Act No. 4 violates the Constitution of the United States or the amendments thereto. By its decision in *Brown* v. *Board of Education*, 347 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686, and the other cases decided simultaneously therewith, the Supreme Court of the United States did not intend to abolish the police powers of the State. In the *Brown* case and others decided at that time, the Court was dealing with facts in those cases, which were entirely different from the facts presented in the case at bar. The courts may take judicial knowledge of certain things that transpired in connection with the attempt to integrate a Little Rock public school. In *Rice* v. *Shook*, 27 Ark. 137, this Court said: "The Court will judicially notice that, at the date of the note, Little Rock and a large part of the State were and had been, for some considerable time previously, in possession of the forces of the United States."

An attempt to integrate a school in Little Rock brought about intolerable conditions. When the attempt was made to integrate one school by sending nine Negro students to a White school there was such a violent reaction on the part of the people that it was deemed necessary by the President of the United States to muster into federal service the Arkansas National Guard to reinforce a division of crack first-line United States troops, fully armed, sent to Little Rock to restore and maintain order. The troops were stationed at the schools, in the buildings and on the grounds, and armed soldiers patrolled the streets. The soldiers kept order for months at a cost to the people of about $5 million.

At the end of the semester during which the Negro students were kept in the White school, in the spring of 1958, it was thought there would be another effort

to integrate the schools in the fall, and in anticipation of the violence that placing the Negro students in the White school would engender, dozens of men were sworn in as Deputy United States Marshals, and also Deputy United States Marshals from other districts were sent to Little Rock, and all of them were given special training to cope with the violence that it was thought would occur when another effort was made to send Negro students to the White school. Nearly $400,000 of the people's money was spent in getting the Special United States Marshals ready to handle the anticipated violence. It is not known whether they were to work in connection with the troops or as a separate unit.

In the meantime, the State of Arkansas was taking measures to deal with the situation and prevent bloodshed, and a special session of the Legislature passed Act No. 4, now under consideration. In order to prevent violence that would be brought about by sending the Negro children to White schools, and to prevent the use of armed troops in the school buildings and on the school grounds, the Legislature authorized the Governor to close the school affected. But, undoubtedly, the General Assembly felt that if a majority of the voters, including Negro voters (who constitute a large percentage of the total electors in Little Rock), felt that the schools should be opened, then the schools could be conducted without the use of troops and United States Marshals. Act No. 4, therefore, provides for an election to determine if the people wanted the schools opened. Such an election was held, and the vote was overwhelming in favor of keeping the schools closed.

Now, the question is whether in the existing situation Act No. 4 is valid under the police powers of the State. If the State cannot close schools under conditions we know existed in Little Rock when an attempt was made to integrate a school, then neither can the State close the schools when any other dangerous condition exists and the police power, one of the few rights left to the States, is gone, perhaps forever.

The Virginia case of *Harrison* v. *Day*, 106 S. E. 2d 637, is no precedent for the case at bar. In the Virginia case it is clearly stated: "It will be observed that the stated purpose of the plan embodied in these acts is to prevent the enrollment and instruction of white and colored children in the same public schools." Our Act No. 4 is clearly for the purpose of preventing violence and bloodshed. If there had been no violence and no bloodshed and no use of United States troops in connection with the operation of the Central High School in Little Rock, obviously Act No. 4 would never have been adopted. The assertion that the adoption of Act No. 4 was for the purpose of preventing racial integration of the schools under any circumstances is completely refuted by the fact that the University of Arkansas was integrated a long time before the decision in the *Brown* case. Such integration was not compelled by any court. There has been integration of other schools, such as the ones at Hoxie, Van Buren, Fayetteville, and perhaps others, but the schools were not closed by the Governor under authority of Act No. 4 because it was not necessary. There was no violence at those places. Act No. 4 grew out of the violence and use of troops and it was adopted to prevent such an occurrence in the future. If the State cannot use its police powers to prevent violence and bloodshed and when conditions are chaotic, thereby making necessary the use of United States troops and the National Guard to restore and maintain order among the people, then the State has no police power.

Without attempting to go into a long dissertation on the police power of the States and its scope, I merely quote from what the United States Supreme Court and other authorities have said on the subject: "It has repeatedly been held that no provisions of the Federal Constitution and none of the amendments added to that instrument were intended or designed to interfere with the police power of the various states." 11 Am. Jur. 986. "In accordance with the settled principle that no part of the Federal Constitution was intended to hamper a valid exercise of state police regulation, it is particularly

established by overwhelming authority that the Fourteenth Amendment was not designed to interfere with, and does not interfere with, curtail, restrain, destroy, or take from the states the right duly and properly to exercise the police power. Furthermore, this amendment does not limit the subjects upon which the police power of a state may be exerted." 11 Am. Jur. 995-7.

In a letter to Mr. Duff Green, President Lincoln said: "The maintenance inviolate of the rights of the states, and especially the right of each state, to order and control its own domestic institutions, according to its own judgment, exclusively, is essential to the balance of powers upon which the perfection and endurance of our political fabric depend."

"It is settled by repeated decisions of this Court that the equal protection clause does not take from a state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary." *Whitney* v. *California*, 274 U. S. 357, 71 L. Ed. 1095, 47 S. Ct. 641. "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. . . . Whatever differences of opinion may exist as to the extent and boundaries of the police power and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to the class of objects which demand the application of the maxim, *salus populi suprema lex* (Let the welfare of the people be the supreme law); and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be

bargained away than the power itself. *Boyd* v. *Alabama*, 94 U. S. 645." *Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. Ed. 989.

"But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety." *Mugler* v. *Kansas*, 123 U. S. 623, 660, 31 L. Ed. 205, 8 S. Ct. 273. In that case the Court further said: "No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare. This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the States of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in *Barbier* v. *Connolly*, 113 U. S. 27, 31, that the Fourteenth Amendment had no such effect. After observing, among other things, that that Amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the Amendment — broad and comprehensive as it is — nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, *education*, and good order of the people, and to legislate so as to

increase the industries of the State, develop its resources, and add to its wealth and prosperity.'" (Italics ours)

Cases without number could be cited to the same effect. But it might appear to be an act of supererogation to cite here the innumerable cases wherein the Supreme Court of the United States has held that the police power of the States was not impaired by the Fourteenth or any other amendment. In *Otis v. Parker*, 187 U. S. 606, 608, 47 L. Ed. 323, 23 S. Ct. 168, Mr. Justice HOLMES said: "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, should become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus* (always, everywhere and by all). *Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what the policy required. Such a deep-seated conviction is entitled to great respect.*" (Italics ours)

No one contends that the people of Arkansas do not have the rights to abolish the entire public school system if they so desire. Certainly under its police power the State has the authority to close a school to prevent violence and bloodshed and where, if the school were maintained, the teachers and students would have to take orders from soldiers with fixed bayonets, and Deputy United States Marshals.

APPENDIX

AMENDMENT NO. 44

"§ 1. Action by general assembly to protect states' rights.—From and after the adoption of this Amendment, the General Asembly of the State of Arkansas shall take appropriate action and pass laws opposing in every Constitutional manner the Un-Constitutional desegration decisions of May 17, 1954, and May 31, 1955, of the United States Supreme Court, including interposing the sovereignty of the State of Arkansas to the end of nullification of these and all deliberate, palpable and dangerous invasions of or encroachments upon rights and powers not delegated to the United States nor prohibited to the States by the Constitution of the United States and Amendments thereto, and those rights and powers reserved to the States and to the people thereof by any department, commission, officer, or employee of such department or commission of the Government of the United States, or of any government of any Nation or Federation of Nations acting upon the apparent authority granted them by or assumed by them from the Government of the United States. Said oppisition shall continue steadfast until such time as such Un-Constitutional invasions or encroachments shall have been abated or shall have been rectified, or the same shall be transformed into an Amendment to the Constitution of the United States and adopted by action of three-fourths of the States as provided therein.

"§ 2. Statutes for administration and enforcement of amendment—Appropriations.—The General Assembly shall enact laws to insure the administration and enforcement of the spirit and letter of this Amendment; and shall appropriate adequate funds to effect the same, including a proportionate share of such expenses as may be necessary for the maintenance of regional committees created among the States for the preservation of rights belonging to the states and the people thereof.

"§ 3. Regulation of health, morals, education, marriage and good order.—The General Assembly shall enact such laws under the Police Powers reserved to the States as may be necessary to regulate health, morals, education, marriage, good order and to insure the domestic tranquility of the citizens of the State of Arkansas.

"§ 4. Public officers and employees — No immunity for violation of laws enacted under amendment — Forfeiture of office for violations.—No public official or employee of the State of Arkansas or of any political subdivision thereof shall have immunity from arrest, prosecution and trial for the violation of such penal laws as the General Assembly shall provide for the willful failure and refusal to carry out the clear mandates of this Amendment; and in addition to the penalties provided for by the General Assembly, shall automatically forfeit his or her office.

"Repealing Clause. Section 5 of Amendment No. 44, read: 'All parts of the Constitution of the State of Arkansas in conflict with this Amendment be, and the same are, hereby repealed.'"

ARKANSAS RESOLUTION OF INTERPOSITION

"*Be it Resolved and Enacted by the People of the State of Arkansas:*

"The people of the State of Arkansas express their firm resolution to maintain and defend the Constitution of the United States and the Constitution of the State of Arkansas against every attempt, whether foreign or domestic, to weaken or destroy the structure of the State and federal governments.

"The People of Arkansas will ever defend and maintain the fundamental principle of our basic laws by which certain powers were delegated by the people of the separate states to the governments of the separate states while other specifically enumerated powers, not delegated to the separate states or reserved to the people, were delegated to the federal government. The

State has never delegated to the Supreme Court of the United States the power to change the Constitution of the United States.

"The People of Arkansas assert that the maintenance inviolate of the rights of the States, and especially the right of each State to order and control its own domestic institutions according to its own judgment exclusively, is essential to that balance of power on which the perfection and endurance of our political faith depends.

"The People of Arkansas assert that the power to operate public schools in the State on a racially separate but substantially equal basis was granted by the people of Arkansas to the government of the State of Arkansas; and that, by ratification of the Fourteenth Amendment neither the State of Arkansas nor its people delegated to the federal government, expressly or by implication, the power to regulate or control the operation of the domestic institutions of Arkansas; and any and all decisions of the federal courts or any other department of the federal government to the contrary notwithstanding.

"Therefore, The People of Arkansas, By Popular Vote:

"1. Respectfully appeal to all the people of the United States and to the governments of all the separate states and request them to join the people of Arkansas in taking steps, pursuant to Article V of the Constitution of the United States, by which the Constitution of the United States be amended so as to contain a provision substantially as follows:

"The legislative, executive and judicial powers of the United States as granted under the Constitution shall not be construed to extend to the regulation of the public schools of any State nor to include a prohibition to any State, in the exercise of its power, to provide by its laws for the establishment, operation and maintenance of racially separate but substantially equal public schools within such State."

"2. Pledge our firm intention to take all appropriate measures, honorably and legally available to us, to resist any and all illegal encroachments upon the powers reserved to the State of Arkansas to order and control its own domestic institutions according to its own exclusive judgment.

"3. Urge upon the separate States and the people thereof their prompt and deliberate efforts to prohibit any further encroachments by the Federal government upon the powers reserved to the separate states and the people thereof."

Dissenting opinion delivered April 27, 1959.

ED. F. MCFADDIN, Associate Justice, dissenting. On May 17, 1954, the United States Supreme Court delivered its first decision in *Brown* v. *Board of Education* (347 U. S. 483, 98 L. Ed. 873, 74 S. Ct. 686), which was most unfortunate, and which many believe to be entirely unconstitutional.* That decision upset social conditions that had existed in the South from the beginning of the American Union: it decreed racial integration in the public schools. Immediately after that decision, there began in the Southern States — of which Arkansas is proud to be a part — a determined and never-to-be-ended campaign to prevent racial integration in the public schools. One of the measures adopted by the Arkansas Legislature to prevent such recial integration was Act No. 4 of the Second Extraordinary Session of 1958; and that Act (hereinafter called "Act No. 4") is the only legislation now before us on this appeal.

The present suit was filed in the Pulaski Chancery Court by Mrs. Garrett (appellant here) against Orval E. Faubus (appellee here), as Governor of Arkansas, seek-

*Under our system of separate but equal schools between the white and negro races, as repeatedly recognized by the United States Supreme Court, the Southern Negro has enjoyed educational facilities and opportunities for racial advancement far superior to those enjoyed by members of that race crowded into ghettos in northern cities. If it would accomplish anything constructive, I would write an entire treatise on why *Brown* v. *Board of Education* is unconstitutional; it is an invasion of the Legislative powers of the Congress, as well as an invasion of the powers reserved to the States in matters of education and local concern. But nothing can be gained, in a decision of the present case, by a further discussion of *Brown* v. *Board of Education*; because I base my views entirely on the Constitution of the State of Arkansas

ing to have Act No. 4 declared unconstitutional as violating Article 14 of the Arkansas Constitution, and also as violative of the Federal Constitution. When a demurrer was sustained and the complaint dismissed, this appeal ensued. The appellant here argues only one point: that Act No. 4 is violative of Article 14 of the State Constitution.* In the *amicus curiae* brief it is urged that Act No. 4 violates not only Article 14 of the Arkansas Constitution, and also Article 2, Section 18 of the Arkansas Constitution, but also Article 2, Section 18 of the Arkansas Constitution, and also the Fourteenth Amendment to the Federal Constitution. Counsel for appellee joins issue with the *amicus curiae* brief on all points; and also urges most strenuously that Act No. 4 is within the police power of the State. I never reach any Federal question. My views are these: (1) the Act No. 4 violates Section 1 of Art. 14 of the Arkansas Constitution; and (2) the claim of "police power" cannot prevent the invalidity of Act No. 4. Now I will elucidate.

1: *Act No. 4.* The Act is captioned: "An Act to Provide the Procedure Under Which the Governor May Order to be Closed the Schools of any School District; and For Other Purposes". The Act provides in Section 1 that the Governor may, by Proclamation, order any school, or all schools, of a District to be closed immediately and call a Special Election to be held in the School District within thirty days thereafter, whenever, *inter alia*:

"(b) integration of the races in any school, or all schools, of the school district has been decreed by an order of any court, and pursuant to the enforcement thereof, the President, or other officer of the United States Government, whether of the executive, legislative, or judicial branch, causes troops, whether regular troops

*The entire argument in the appellant's brief is: "The appellant stands on the plain language of Article 14 of the State Constitution. It is our contention that the plain language of that Article is subject to but one interpretation, and that is that the State shall ever maintain a complete, suitable and efficient system of free schools. Hence, any legislation, or official act thereon, closing a school, except for the peace, health and safety of the public, is directly opposed to Section 1 of Article 14. The Court will take judicial knowledge of the reason for the closing of the schools involved. The lower court should be reversed with directions to sustain the prayer in the complaint."

or the federalized National Guard, United States Marshals, or other force at the federal level, to be stationed in, on or about any such public school; or

"(c) he shall determine that a general, suitable, and efficient educational system cannot be maintained in any school district because of the integration of the races in any school within that district."

The Act No. 4 also provides in Section 2: that when a school has been closed by the Governor in accordance with Section 1 of the Act, then there shall be an election — open to all qualified electors of the school district — and the voting shall be for or against racial integration of *all* of the schools within the school district; that if a majority vote for racial integration, then the schools shall be opened; "... . . otherwise, no school within the district shall be integrated". Section 4 of the Act says: "Any school closed by executive order authorized by this Act shall remain closed until such executive orders is countermanded by Proclamation of the Governor filed with the Secretary of State and the Board of Directors of the School District."

Thus it is clear that whether there will be a school in operation in a district depends on: (1) whether the Governor closes the school and calls an election; (2) how the majority votes on the integration issue; and (3) when the Governor issues a proclamation for reopening of the schools. Stated another way, Act No. 4 makes the continued maintenance of the schools in any school district dependent on: (a) attempted integration; (b) Proclamation of the Governor; and (c) vote of the electors in the school district on the issue of integration.

II. *The Arkansas Constitution.* Now, let us see how Act No. 4 measures up to Section 1 of Art. 14 of the Arkansas Constitution, which reads:

"Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free schools whereby all persons in the

State between the ages of six and twenty-one years may receive gratuitous instruction."

Note the words: "... the State shall ever *maintain* a general ... system of free schools ..." We have many cases decided by this Court construing and applying this section of the Constitution. Some are: *Maddox* v. *Neal*, 45 Ark. 121; *Dickinson* v. *Edmondson*, 120 Ark. 80, 178 S. W. 930, Ann. Cas. 1917C 913; *Krause* v. *Thompson*, 138 Ark. 571, 211 S. W. 925; *School Dist. No. 65* v. *Bangs*, 144 Ark. 34, 221 S. W. 1060; and *Dowell* v. *School Dist.*, 220 Ark. 828, 250 S. W. 2d 127. In *Maddox* v. *Neal* (*supra*), *Chief Justice* COCKRILL said: "Without schools there could be no school system, and the directors cannot dispense with the system .... It is the clear intention of the Constitution and statutes alike, to place the means of education within the reach of every youth. Education at public expense has thus become a legal right extended by the laws to all the people alike .... The opportunity of instruction in the public schools, given by the statute to all the youths of the State, is in obedience, as we have seen, to the special command of the Constitution."

In *Dickinson* v. *Edmondson* (*supra*), Chief Justice MCCULLOCH said: "No one can doubt that those who framed this provision had in mind that schools were to be conducted during each year .... The command of the Constitution is to provide by general laws 'for support of common schools', and that necessarily meant to maintain a system of free schools as complete as can be, and continuous in its operations .... The establishment of high schools is within the limits of common school education because it merely raises the standard of

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* Under Act No. 4 the Governor of Arkansas issued a Proclamation (of which we take judicial notice) on September 12, 1958, closing the public senior high schools of the Little Rock School District; and another Proclamation on September 16th, calling an election for September 27, 1958. At that election the majority vote was against integration, so the four public senior high schools of the Little Rock School District have been closed ever since September, 1958, and an entire school year will soon be completed with no public senior high schools having been maintained in the Little Rock School District.

popular education. High schools are free schools within the meaning of the Constitution . . . ."

In *Krause* v. *Thompson* (*supra*), Chief Justice McCULLOCH said: "Schools facilities must, of course, be afforded where taxation for maintenance of the schools is imposed . . . ." In *School Dist. No. 65* v. *Bangs* (*supra*), the Legislature had passed a law permitting a Special School District in Logan County to charge tuition; and the Act was held unconstitutional by this Court as being in conflict with Art. 14 § 1 of the Constitution which guarantees that instruction be "gratuitous". Mr. Justice HART said:

"As we have already seen, under the plain mandate of our Constitution above quoted and referred t , the gratuitous instruction of all persons in the school district between the ages of six and twenty-one years is guaranteed in the public schools. The terms 'public schools' or 'common schools' are used in our Constitution to denote that such schools are open to all persons within the approved ages rather than to indicate the grade of a school, or what may or may not be taught therein."

A further review of opinions involving Section 1 of Art. 14 of the Arkansas Constitution is unnecessary. The rationale of our holdings is that the constitutional language means what it says, and that the state " . . . shall ever maintain a general . . . . system of free schools whereby all persons . . . between the ages of six and twenty-one . . . may receive instruction . . ." That is the constitutional mandate that the People of Arkansas gave to the Legislature and the officials of this State. "To maintain" a high school means to keep it open and operating: that is what the Constitution says; and tax money is being collected in every school district in Arkansas to *maintain* the schools. "It is not the form, but the operation and effect, which determines the constitutionality of a statute." (*Webb* v. *Adams*, 180 Ark. 713, 23 S. W. 2d 617.)

As heretofore shown, Act No. 4 allows the schools to be closed indefinitely as long as the threat of racial

integration exists, and allows a vote to be taken — on a local option basis — to determine when and under what conditions the schools shall be reopened. Art. 14 of the Arkansas Constitution gives no such power to the Governor, or any other person, to close the schools. Neither does the Constitution provide for local option to determine the schools. So I maintain that Act No. 4 violates Section 1 of Art. 14 of the Arkansas Constitution. I can see it no other way.

But it has been said that when we adopted our Constitution in 1874, the rule of "separate but equal" governed in school matters, and that when the United States Supreme Court revolutionized that rule by the decision of *Brown v. Board of Education* in 1954, then the State of Arkansas had a right to change its policy on public education. It is true that the State has a right to change its policy on public education,* but the point is, that Art. 14 of our Constitution has *not* been repealed by vote of the People of Arkansas,** and until Art. 14 of the Constitution is repealed, this Court must continue to test legislation by the Constitution as it is, and not by what we think it may be in the future. Two wrongs will never make a right: just because the Supreme Court of the United States went contrary to the Federal Constitution in *Brown v. Board of Education*, is no reason or excuse why this State Court should go contrary to our State Constitution. Until the People of Arkansas repeal Art. 14 of our Constitution, this Court should obey Art. 14, which guarantees that the State shall maintain free schools. Act No. 4 violates that constitution guaranty. If the People of Arkansas want to strike Art. 14 from the Constitution, then the schools may be closed under

* Webster's Unabridged Dictionary says that "maintain" means, *inter alia*, "... to hold or keep in any particular state or condition ... to support ... not to suffer to fail or decline ... to bear the expense of ... to carry on ... to give support to ..."

** Amendment No. 44 to the Arkansas Constitution was not mentioned in any of the briefs. That Amendment certainly does not expressly repeal Section 1, Art. 14 of the Arkansas Constitution. Neither does Amendment No. 44 impliedly repeal said Section 1 of Art. 14, because implied repeals are not favored, either in constitutional or statutory construction (16 C.J.S. p. 35 and p. 131). One might just as well argue that the Amendment No. 44 impliedly repeals Art. 2 of the Arkansas Constitution (the declaration of rights) or that it impliedly repeals Art. 14, of the Arkansas Constitution of 1868, which required the maintenance of free schools.

some legislation similar to Act No. 4. But until Art. 14 of the Constitution is repealed, then it is my solemn and sincere view that Act No. 4 is violative of the Arkansas Constitution.

III. *Police Power.* These words are used to express various legal concepts, and a distinction of use is necessary. In this case, the words, "police power", have at least three different concepts:

(1) The power reserved to the States, as contrasted to the Federal power:

(2) The inherent power of the State Legislative department; and

(3) The emergency powers of the Legislative or Executive Department.

In the present case I am not concerned with the first application (*i. e. State* v. *Federal*) because I never reach any Federal question; and all the cases about "reserved powers of the State" are entirely beside the mark, as I see the case. Act No. 4 violates the State Constitution: and so I never reach any Federal question. I will, however, discuss concepts 2 and 3 (*supra*) to show that Act No. 4 cannot be upheld on the basis of police power.

The rule is recognized everywhere that the police power of the State Legislature is limited by the State Constitution. In 16 C. J. S. 949 "Constitutional Law" § 196, cases from over a score of jurisdictions are cited to sustain this statement: "*Limited by the state constitution.* However broad the scope of the police power, it is always subject to the rule that the Legislature may not exercise any power that is expressly or impliedly forbidden to it by the State Constitution, nor may constitutional guaranties and limitations be set aside, by an application of such power, because of changed economic, sociological, or political conditions". In *Gaines* v. *Holmes*, 154 Ga. 344, 114 S. E. 327, 27 A. L. R. 98, the Supreme Court of Georgia quoted this language: "'If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the pub-

lic safety . . . is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution' ". In *People* v. *Chicago Co.*, 306 Ill. 486, 138 N. E. 155, 28 A. L. R. 610, the Supreme Court of Illinois quoted this language: " '. . . no exercise of the police power can disregard the constitutional guaranties in respect to the taking of private property, due process, and equal protection of the laws, and should not override the demands of natural justice.' " In *Goldman* v. *Crowther*, 147 Md. 282, 128 A. 50, 38 A. L. R. 1455, the Maryland Court of Appeals quoted this language regarding the police power: " 'But necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution' ". In Cooley on "Constitutional Limitations" 8th Ed. p. 1229, in speaking of the police power, this appears: "But the power is subject to the limitations imposed by the . . . State Constitutions upon every power of government, and it will not be suffered to invade or impair the fundamental liberties of the citizens".

In short, the Arkansas Legislature cannot, under the guise of police power, enact legislation contrary to the Arkansas Constitution. To hold otherwise would make the Constitution of no protection. So, in the case at bar: the guaranty contained in Section 1 of Art. 14 of the Arkansas Constitution is for the *maintenance* of schools; and this guaranty cannot be nullified by the Legislature under the guise of the police power, because such power does not extend to legislation violating our own Constitution.

I come then to concept 3 of the police power (*i. e.* the emergency power). There is a line of cases which says that statutes may be enacted by the Legislature, or Proclamation made by the Governor, to cope with unusual emergencies and exigencies. This is discussed in 11 Am. Jur. 974, "Constitutional Law" § 252, "Emergency Police Legislation." But the cases on such emergency police legislation recognize that a law dependent upon the existence of an emergency can only apply to an *emergency situation;* and that such a law ceases to

operate when the emergency is past; and that it is the duty of the Courts to decide as to the existence and the end of the emergency.

Of course, in time of plague, pestilence, or other great danger, schools can be closed as health measures or police measures; but this is only for the emergency. In the case at bar, the closing is permanent — not merely until some plague or pestilence or danger has subsided, but — the schools will be closed as long as there is a threat of racial integration in the schools. That is too long. An entire generation could grow up — and probably will — while we are striving to get a Supreme Court of the United States that will overrule *Brown* v. *Board of Education* and return to the constitution doctrine of "separate but equal". Meantime, are the schools to remain closed? They have already been closed for nearly a whole school year. Under Act No. 4 they could be closed for an entire generation. Thus it is clear that Act No. 4 cannot be sustained under any theory of "Emergency Police Powers", because we are not dealing with the kind of an emergency that permits the use of "Emergency Police Powers". Rather, we are dealing with a condition that has already existed since 1954 and will continue to exist until either the United States Constitution is amended or the United States Supreme Court overrules *Brown* v. *Board of Education*.

Two wrongs do not make a right. Let the Supreme Court of Arkansas stay within the Arkansas Constitution, even if the United States Supreme Court has not stayed within the Federal Constitution. Section 1 of Art. 14 of the Arkansas Constitution says: ". . . . the State . . . shall ever maintain a general . . . system of free schools . . ." The State is not "maintaining", and never will "maintain" such a system under Act No. 4; and so I sincerely and solemnly say that Act No. 4 violates Section 1 of Art. 14 of the Arkansas Constitution and should be stricken.

APPENDIX G

FITZHUGH v. FORD

5-1837

Opinion delivered May 4, 1959.

PAUL WARD, Associate Justice. This appeal challenges the (Arkansas) constitutionality of Act 5 passed by the 1958 Second Extraordinary Session of the General Assembly, which Act provides for the allocation of certain school funds for the benefit of those students who attended the schools closed under Act 4 of the same session of the General Assembly.

On September 16, 1958, L. R. Fitzhugh, et al, being resident citizens, taxpayers and electors of the Little Rock School District, filed a petition in Chancery Court against Arch Ford as Commissioner of Education and Joe L. Hudson, the disbursing agent, alleging that said Act 5 violated Article 12, Section 12; Article 16, Section 11, and: Article 16, Section 1 (as amended by Amendment 13), and that the defendants will unlawfully withhold and redistribute state funds unless enjoined from doing so. The prayer was in accordance with the above allegations.

On September 30, 1958, defendants demurred to the petition on the ground that it did not state a cause of action. Upon the court sustaining the demurrer and upon the petitioners' refusal to plead further, the petition was dismissed, and this appeal follows.

In essence, Act 5 provides: (a) It requires the Commissioner of Education to withhold certain *State Funds* (otherwise allocable to a school district wherein a school has been closed under said Act 4) in an amount calculated on a certain *pro rata* basis, the correctness of which is not challenged here and which is not material to this opinion; (b) It requires the Commissioner of Edu-

cation to pay over to other *public schools* or *non profit private schools* accredited by the State Board of Education the funds so withheld an amount calculated on a *pro rata* basis according to the number of students (from the closed schools) attending a recipient school. Simply and briefly stated, Act 5 provides that the money which normally would be spent on a student in a closed school would be paid to the school which he might later attend.

It is contended by appellants that Act 5 violates the three sections of the Arkansas Constitution set out above, and we will discuss them separately in the order mentioned.

1. Article 12, Section 12, in relevant part provides:

"Except as herein otherwise provided, the State shall never assume or pay the debt or liability of any county, town, city, or other corporation whatever, or any part thereof, unless such debt or liability shall have been created to repel invasion, suppress insurrection or to provide for the public welfare and defense."

Appellants' argument in relation to the above section is directed only to the payment of public school funds to a *private school*. Frankly, we are unable to see how the transactions contemplated under Act 5 create a debt or liability on the part of a non-profit private school. If a student from a closed school attends such a private school, any resulting debt or liability would be payable to the school, not by it. Consequently there would be no school debt or liability for the State to assume or pay. There might, of course, be a debt owing by the student to the school, and if we can imagine a student being placed in the category of a "county, town, city, or other corporation", even then the payment by the State of such a debt has often been approved by our legislature without challenge as to legality. Act 382 of 1947 (now repealed) provided for the state to pay the expenses of World War II veterans who might wish to study veterinary medicine, dentistry, architecture, *etc.*, in schools outside the State of Arkansas. For that purpose $100,000 was appropriated from the General Revenue Fund. Act

243 of 1957 makes similar provisions without restrictions as to courses pursued. Act 313 of 1945 (Ark. Stats. 78-1601) empowers the State to make leases to the Arkansas Livestock Show Association, a private organization, and to furnish money "for the purpose of paying premiums . . . . ." These and other acts that might be cited are not relied on primarily to sustain the constitutionality of Act 5 but to show a trend or policy that was adopted by the State long before Act 5 was enacted.

2. We do not agree with the contention by appellants that Act 5 violates Article 16, Section 11, of the State Constitution. This section reads: No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same; *and no moneys arising from a tax levied for one purpose shall be used for any other purpose.*" The portion emphasized is what appellants believe to be relevant here. Nor do we agree with appellants that *Page, Treasurer v. Alexander, Treasurer*, 206 Ark. 479, 177 S. W. 2d 415, sustains their contention, because the facts were entirely different. In the *Page* case this court, in construing Act 187 of 1943 which directs that a certain per centum of the sales tax should go to "cities and counties," held it did not include funds accruing before the effective date of the Act. It will be noted that Act 5 deals only with *State Funds* allocable to individual school districts. So, when a portion of the money allocated to a particular school district follows a student from that district to another school, the finances of no other school district are affected adversely. Legally this amounts to nothing more than transferring a student in one school district to a school in another district accompanied by his portion of the tax fund, which has long been sanctioned by legislative enactment and by this Court. See: Ark. Stats. Section 80-1517, *Jones v. Floyd*, 129 Ark. 185, 195 S. W. 360, and *Van Buren County Board of Education v. Suggs*, 183 Ark. 535, 37 S. W. 2d 703. We also held in *Bell v. Womack*, 174 Ark. 971, 298 S. W. 222, under facts much more favorable to appellants than those of this case, that there was no diversion of funds and hence no violation of Article 14, Section 2 of our Constitution.

This section is very similar to, if not in effect the same as, the section here under consideration.

3. Finally, appellants say Act 5 violates Article 16, Section 1, (as amended by Amendment No. 13) of the Constitution. As stated by appellants, the relevant portion of the above section prohibits the State from lending "its credit for any purpose whatever." Appellants have failed to point out the manner in which the State would be lending its credit under the provisions of Act 5, and we can think of none. In fact we fail to see how credit is in any way involved. No money will be expended until after it has been collected and appropriated. All the decisions of this court approaching the issues here that we have been able to find are contrary to appellants' contention. See: *Hays* v. *McDaniel, Treasurer*, 130 Ark. 52, 196 S. W. 934; *Schmutz* v. *Special District of Little Rock*, 78 Ark. 118, 95 S. W. 438; *Lackey* v. *Fayetteville Water Company*, 80 Ark. 108, 96 S. W. 622; *Board of Directors of Jefferson County Bridge District* v. *Collier*, 104 Ark. 425, 149 S. W. 66; and *Halbert* v. *Helena-West Helena Industrial Development Corporation*, 226 Ark. 620, 291 S. W. 2d 802.

Affirmed.

McFADDIN, J. concurs.

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Supreme Court of the United States

October Term, 1959

No. 458

ORVAL E. FAUBUS, Governor of the State of Arkansas,

Appellant,

—v.—

JOHN AARON, *et al.*,

Appellees.

No. 471

ARKANSAS STATE BOARD OF EDUCATION, and ARCH W. FORD, Commissioner of Education,

Appellants,

—v.—

JOHN AARON, *et al.*,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

D.

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees in the above-entitled cases move to affirm on the ground that the questions presented are so unsubstantial as not to need further argument.

Questions Presented

Appellees, for the purposes of this motion, adopt the "Questions" as presented by appellant in No. 458 at pages 4-5 of his Jurisdictional Statement and by appellants in No. 471 at page 3 of their Statement as to Jurisdiction.

Statement of the Case

The appeals in this case involve the constitutionality of the two Arkansas school closing laws which were adopted at a special session of the legislature following the decision of the Court of Appeals in *Aaron* v. *Cooper*, 243 F. 2d 361, signed into law by the Governor of Arkansas on the day this Court decided *Cooper* v. *Aaron*, 358 U. S. 1, and, thereafter, on that same day, set in operation by the Governor's promulgation of a Proclamation closing all of the senior high schools in Little Rock.

The complete history of this litigation from its inception plus a statement of the proceedings giving rise to these appeals, as well as the undisputed facts there adduced, are set out in the *per curiam* opinion below. 173 F. Supp. 944.

Reasons for Granting the Motion

1. The questions presented on the instant appeals in the Little Rock litigation put in issue another attempt of state officials to "war against the Constitution." Earlier efforts to do so by means of gubernatorial, judicial and administrative action could not be squared with the mandate of the Federal Constitution. *Faubus* v. *United States*, 254 F. 2d 797, cert. denied 358 U. S. 829; *Thomason* v. *Cooper*, 254 F. 2d 808; *Cooper* v. *Aaron*, 358 U. S. 1. The case at bar merely concerns an attempt to achieve the forbidden end by legislative action. Thus, the case has nothing else to distinguish it and the decision by the court below is correct. See *Cooper* v. *Aaron*, 358 U. S. 1, 16-19; *Aaron* v. *Cooper*, 261 F. 2d 97, 99-102, 108; *James* v. *Almond*, 170 F. Supp. 331 (E. D. Va. 1959); *Harrison* v. *Day*, 200 Va. 439, 106 S. E. 2d 636 (1959). Cf. *James* v. *Duckworth*, 173 F. Supp. 342, 346-347 (E. D. Va. 1959), affirmed *Duckworth*

v. *James*, 267 F. 2d 224 (4th Cir. 1959), cert. denied 28 U. S. L. Week 3110 (October 13, 1959) (No. 286).

2. Moreover, the issue raised by appellants is "too moribund" for full hearing. Over a century before this Court in *Cooper* v. *Aaron* admonished state officials not to essay nullification by legislation—either "openly and directly" or "indirectly . . . through evasive schemes"—Justice Clifford, speaking for the Court in *Riggs* v. *Johnson County*, 6 Wall. 166, said at page 195:

> Repeated decisions of this court have also determined that state laws, whether general or enacted for the particular case, cannot in any manner limit or affect the operation of process or proceedings in the Federal Courts. *U. S.* v. *Peters*, 5 Cranch, 136.
>
> The Constitution itself becomes a mockery, say the court in that case, if the state legislature may at will annul the judgments of the Federal courts, and the nation is deprived of the means of enforcing its own laws by the instrumentality of its own tribunals. *Slocum* v. *Mayberry*, 2 Wheat. 9; *Beers* v. *Haughton*, 9 Pet. 359.

3. Finally, there is no substantial merit to appellants' positions with respect to judgment below with respect to Act 5, as amended by Act 151. In No. 458 appellant asserts that the decision of the Supreme Court of Arkansas in *Fitzhugh* v. *Ford*, 323 S. W. 2d 559, is involved (Appellant's Brief, p. 4) and, subsequently, argues that it should control the disposition of this appeal (*ibid.*, pp. 18-20). However, the state Supreme Court "did not consider whether [Act No. 5] violated any part of the Constitution of the United States." 173 F. Supp. 944, 951. See Appellants' Brief, page 4. Furthermore, although appellant made no suggestion of this, the construction given Act 5

in *Fitzhugh* v. *Ford* was one which neither precluded nor avoided decision on the constitutionality of Act 5 by the court below.

In No. 471 appellants ask this Court to consider the effect of Act 466, an amendment to Act 5 "in effect shortly before the decision of the lower court," which was "apparently not considered" (Appellants' Brief, p. 2). In addition, they indicate that "in [their] brief, a reference to Act 5, as amended, refers to the Act, as amended by Acts 151 and 466, Ark. Acts of 1959" (*id.*). Thereafter, the case they make for full hearing rests—principally, if not exclusively—on the application of Act 466 (see Appellants' Brief, pp. 4-7). But elsewhere appellants explain that "Act 5, as amended, merely authorizes the State Board of Education to withhold funds from schools which have been closed by the Governor under Act 4," and admit that "After Act 466 became effective, the funds could be withheld as before but could not be paid to another district except where a school had been closed by the order of the Governor . . . " (*ibid.*, p. 4).

Thus, here as in *Texas Co.* v. *Brown*, 258 U. S. 466, a case cited by appellants to support this Court's consideration of Act 466, no case is shown for the application of this Act. Rather, as the Court concluded in that case at page 483: "It is conceded that this does not repeal or affect the [instant] laws, and no argument is rested upon it except in support of contentions already disposed of."

CONCLUSION

For the foregoing reasons the questions presented by appellants are clearly unsubstantial and this motion to affirm should be granted.

Respectfully submitted,

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